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## Equitable Mootness: Ignorance is Bliss and Unconstitutional

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## EQUITABLE MOOTNESS: IGNORANCE IS BLISS AND UNCONSTITUTIONAL

Robert Miller<sup>1</sup>

### ABSTRACT

*Even as other prudential limitations lose favor, equitable mootness continues to thrive. Its popularity derives from practical considerations: it protects third parties who have relied upon transactions approved by the bankruptcy court from the perceived unfairness wrought by reversal on appeal. In spite of its merit, equitable mootness lacks not only a statutory foundation but it also unconstitutionally extinguishes an appellant's right to an adjudication on the merits by an Article III judge. Recent Supreme Court opinions have tied the constitutionality of today's bankruptcy judge adjudications and appeals to the traditional boundaries of such matters at common law and under the 1800 Bankruptcy Act. Because bankruptcy judgments were historically subject to appellate review, eliminating the modern analog based solely upon prudence violates an appellant's constitutional rights. Rather than continue to apply equitable mootness, courts should retreat to its origins, the stay of a judgment pending appeal. Expanding the stay pending appeal test to consider the *raison d'être* for equitable mootness, the unfairness to third parties wrought by reversal, weighs this concern in a constitutional package.*

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<sup>1</sup> Partner at Manier & Herod, P.C. All the views expressed, and mistakes made herein are the author's own. Many thanks to Professors Steven Lubben and Christopher Frost, as well as Charlie Shelton, for their thoughtful comments. This Article is dedicated to my son, Everett P. Miller.

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## INTRODUCTION

To safeguard the balance created by the separation of powers among the three branches of government, courts should exercise their statutory jurisdiction to the furthest extent.<sup>2</sup> Paradoxically, judges have self-imposed limitations on their authority. These prudential limitations<sup>3</sup> allow unelected tribunals to punt on matters that the elected branches have expressly given them a duty to decide.<sup>4</sup> Recent Supreme Court jurisprudence has rightly condemned prudential limitations.<sup>5</sup> Nonetheless, prudential limitations peculiar to bankruptcy frequently limit parties' appellate rights.<sup>6</sup> One of these limitations is equitable mootness.

Equitable mootness eliminates a litigant's appellate rights without any consideration of the merits of its appeal, if reversing complex court-approved transactions<sup>7</sup> is inequitable.<sup>8</sup> Supporters of the doctrine cite a number of policy bases as support for the doctrine including the difficulty of undoing complex transactions, the promotion of finality in order for debtors to consummate transactions necessary for reorganizations, and the importance of protecting third parties' reliance interests in such transactions.<sup>9</sup> Without equitable mootness, courts have questioned whether "any complex plan would be consummated until all appeals are terminated."<sup>10</sup> Although such statements may be hyperbolic, eliminating equitable mootness would alter the parties' relative strengths and leverage points. Certainly, debtors' bargaining power would be weakened because third parties would price-in a greater risk of a successful appeal into the cost of the transaction. Third parties might also be less willing to conduct business with the debtor if the specter of a reversal looms larger.<sup>11</sup>

<sup>2</sup> See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 821 (1976); and then citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

<sup>3</sup> See generally Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017) (discussing democratic concerns raised by prudential limitations).

<sup>4</sup> See *Ochadlus v. City of Detroit* (*In re City of Detroit*), 838 F.3d 792, 800 (6th Cir. 2016). See generally, Smith, Jr., *supra* note 3.

<sup>5</sup> See, e.g., *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–26 (2014).

<sup>6</sup> These limitations include the doctrine of equitable mootness discussed in this Article as well as the person aggrieved standard for standing to appeal. Although both doctrines originated in bankruptcy, the obvious parallels between bankruptcy and receivership proceedings have led to their application to receivership appeals. See, e.g., *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 746 (9th Cir. 2005) (applying equitable mootness to receivership appeal of receiver's plan); *Fid. Bank, Nat'l Ass'n v. M.M. Grp., Inc.*, 77 F.3d 880, 882 (6th Cir. 1996) (applying person aggrieved doctrine to appellate standing in receivership proceeding).

<sup>7</sup> Although the doctrine of equitable mootness is most commonly applied in the context of appeals of the confirmation of plans of reorganization, it has also been applied regarding appeals of the confirmation of liquidating plans, "settlements, injunctive relief, leave to file untimely proofs of claim, class certification, property rights, asset sales, [ ] payment of prepetition wages[,] . . . [and] financing orders." *In re Arcapita Bank B.S.C.(C)*, Nos. 13 Civ. 5755(SAS), 13 Civ. 5756(SAS), 2014 WL 46552, at \*5 (S.D.N.Y. Jan. 6, 2014). The Article uses the terms plan and transaction interchangeably.

<sup>8</sup> *In re Transwest Resort Props., Inc.*, 801 F.3d 1161, 1167 (9th Cir. 2015).

<sup>9</sup> *In re Tribune Media Co.*, 799 F.3d 272, 279 (3d Cir. 2015).

<sup>10</sup> *Id.* at 288.

<sup>11</sup> See *Burchinal v. Cent. Wash. Bank* (*In re Adams Apple, Inc.*), 829 F.2d 1484, 1488 (9th Cir. 1987).

Meanwhile, appellants' holdup power would be amplified as a party with a plausible appeal could cloud a debtor's emergence from bankruptcy for many years until either all appeals are exhausted or an extortionate settlement is extracted.<sup>12</sup> To be sure, the complexity inherent in many bankruptcy transactions combined with the impact on third parties and debtors can make the effects of reversal appear inequitable.

For a number of reasons, the popularity of equitable mootness appears poised to increase. First, as the size of corporate groups grows, so does the complexity of the accompanying restructurings and the number of third parties relying upon the restructuring. Courts will be ever more cognizant of the difficulty to equitably unscramble these transactions. Second, there are minimal downside risks for requesting a dismissal based on equitable mootness. In the context of a mega bankruptcy case, the cost of asserting equitable mootness is miniscule compared to the benefits if the appeal is dismissed. Third, the Supreme Court has refused to grant certiorari to evaluate the doctrine<sup>13</sup> while the Courts of Appeals have unanimously applied it.<sup>14</sup> Fourth, it has been expanded outside of its original application in chapter 11 cases to chapter 7,<sup>15</sup> chapter 9,<sup>16</sup> chapter 13,<sup>17</sup> 11 U.S.C. § 304 (the predecessor to chapter 15) cases<sup>18</sup> and receivership cases.<sup>19</sup> Further expansion is possible as parties are now requesting the equitable mootness be applied outside of the insolvency cases.<sup>20</sup>

Although the merits and popularity of equitable mootness are obvious, problems beset the doctrine. In spite of Courts of Appeals' admonitions that the doctrine should only be applied cautiously, "district courts have continued to invoke the doctrine in modest, non-complex bankruptcies and where appellants have sought limited

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<sup>12</sup> *In re Tribune Media*, 799 F.3d at 288–89 (Ambro, J., concurring).

<sup>13</sup> See, e.g., *Ochadlaus v. City of Detroit* (*In re City of Detroit*), 838 F.3d 792 (6th Cir. 2016), cert. denied, 137 S. Ct. 1584 (2017), cert. denied sub nom, *Quinn v. City of Detroit*, 137 S. Ct. 2270 (2017); *In re Tribune Media*, 799 F.3d 272, cert. denied sub nom, *Aurelius Capital Mgmt., L.P. v. Tribune Media Co.*, 136 S. Ct. 1459 (2016).

<sup>14</sup> See *In re Tribune Media*, 799 F.3d at 285. All the circuits except the Federal Circuit (which does not hear bankruptcy appeals) have at least recognized equitable mootness in some form, while of these, the Eighth Circuit is the only one that has yet to recognize it in a published opinion. See *Briggs v. LaBarge* (*In re McGregory*), 223 F. App'x 530, 531 (8th Cir. 2007); *Briggs v. LaBarge* (*In re Smith*), 209 F. App'x 607, 607–08 (8th Cir. 2006).

<sup>15</sup> *Stokes v. Gardner*, 483 F. App'x 345, 346 (9th Cir. 2012); see also *In re Nica Holdings, Inc.*, 810 F.3d 781, 786 n.4 (11th Cir. 2015) ("assum[ing] without deciding" that equitable mootness is applicable in chapter 7).

<sup>16</sup> *Bennett v. Jefferson Cty.*, 899 F.3d 1240, 1251 (11th Cir. 2018); *In re City of Detroit*, 838 F.3d at 804–05; *In re City of Vallejo*, 551 F. App'x 339, 339 (9th Cir. 2013); *In re City of Stockton*, 542 B.R. 261, 274 (BAP 9th Cir. 2015); *Alexander v. Barnwell Cty. Hosp.*, 498 B.R. 550, 560 (D.S.C. 2013).

<sup>17</sup> *Walker v. Grigsby*, Civil Action No. AW–06–62, 2006 WL 4877450, at \*5 (Bankr. D. Md. Apr. 11, 2006).

<sup>18</sup> *Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 885–86, 890–91 (S.D.N.Y. 1994).

<sup>19</sup> *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 746 (9th Cir. 2005); see *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 332 (7th Cir. 2010) (recognizing the possibility of applying equitable mootness but determining the appeal on the merits).

<sup>20</sup> See *United States v. Par. Chem. Co.*, No. 17–4192, 2019 WL 81978, at \*5 (10th Cir. Jan. 3, 2019) (appellees requested the court apply equitable mootness to sale of property pursuant Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) lien but Court of Appeals determined appeal on the merits).

relief.”<sup>21</sup> Just as troubling, the frequent appeals of equitable mootness determinations, often followed by remands to the district courts for merits determinations,<sup>22</sup> undermine its promise of finality.<sup>23</sup> Seeking to buttress their authority, some courts have attempted to tether equitable mootness to the provisions of the Bankruptcy Code,<sup>24</sup> but none exist.<sup>25</sup> This lack of statutory basis is not just an academic problem; it leaves courts without an anchor for the inquiry itself. Lacking express guidance, courts apply different factors with different weights—leading to different results depending upon the venue. In spite of these problems, courts almost unanimously uphold it against challenges. Only recently have judges questioned its current formulation as arbitrary, unconstitutional, and inefficient.<sup>26</sup>

Courts applying equitable mootness substitute their own views on the relative importance of the appellant’s rights compared to third parties’—a prudential decision. This decision is made without considering the merits.<sup>27</sup> The separation of powers concerns are obvious. In recently limiting the application of prudential standing, the Supreme Court explained that “[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”<sup>28</sup> Substitute “appellate right” for “cause of action” and the problems created by the doctrine of equitable mootness crystalize.

This Article explores the newest critique of equitable mootness: its violation of Article III of the Constitution. Equitable mootness is constitutionally questionable because it denies appellants’ right to an appeal on the merits by an Article III judge. The Supreme Court has repeatedly suggested that the constitutionality of bankruptcy adjudications depends upon the historical treatment of such matters at common law

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<sup>21</sup> *In re One2One Commc’ns, LLC*, 805 F.3d 428, 438–39 (3d Cir. 2015) (Krause, J., concurring); see also *id.* at 439 (“Sincce *Continental Airlines*, we have reversed findings of equitable mootness or declined to dismiss appeals as equitably moot no less than seven times.”). Some may posit that the willingness of district court judges to apply equitable mootness stems from their desire to dispose of bankruptcy appeals as quickly as possible. See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 791–92 (2010) (examining disinclination of Article III judges to adjudicate bankruptcy matters).

<sup>22</sup> This Article will assume that the appeal from the bankruptcy court was made to a district court rather than a bankruptcy appellate panel.

<sup>23</sup> *In re One2One*, 805 F.3d at 446–47 (Krause, J., concurring).

<sup>24</sup> See *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

<sup>25</sup> Although few provisions of the Bankruptcy Code concern appeals, 11 U.S.C. § 363(m) and 11 U.S.C. § 364(e) limit the effect of appellate reversals in certain situations. As explained in Part III of this Article, the enactment of these provisions but not a similar provision providing for equitable mootness suggests Congress did not intend for equitable mootness to exist.

<sup>26</sup> See, e.g., *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 805–06 (6th Cir. 2016) (Moore, J., dissenting); *In re One2One*, 805 F.3d at 443–46 (Krause, J., concurring).

<sup>27</sup> See *In re Cont’l Airlines*, 91 F.3d 553, 567 (3d Cir. 1996) (Alito, J., dissenting) (“The majority adopts the curious doctrine of ‘equitable mootness,’ which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief.”).

<sup>28</sup> *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014).

and federal law contemporaneous with the Framing of the Constitution.<sup>29</sup> In the case of a bankruptcy appeal, Congress would need to provide appellate rights at least as extensive as the rights to appeal the bankruptcy commissioners' orders to the Chancellor and the district courts under the 1800 Act.<sup>30</sup> Based upon this strong historical precedent, the right to appeal from a final order by a bankruptcy judge to an Article III judge is a constitutionally protected right. Equitable mootness eliminates this right and leaves appellants without their constitutionally required determination by an Article III judge.<sup>31</sup>

In spite of these critiques, the policy underlying equitable mootness—the inequity of reversal on third parties who relied upon a restructuring transaction—is a fundamental concern for a functioning corporate bankruptcy regime.<sup>32</sup> A better option for supporting this policy is to add it to the analysis of the stay pending appeal. The link between equitable mootness and stay pending appeal is already strong. Whether a stay pending appeal was sought is the historical genesis of equitable mootness.<sup>33</sup> More recently, courts have gravitated back to this original focus.<sup>34</sup> Adoption of an expanded stay pending appeal test would complete this transition.

The momentum in favor of an expanded stay pending appeal test is deserved. By considering the interests of non-parties affected by a reversal, the policy concerns supporting equitable mootness are addressed while the critiques of equitable mootness are inapplicable. Granted, the stay pending appeal does not provide the same protection to appellees as equitable mootness. Lesser protection constitutionally applied is normatively preferable to greater protection available from an unconstitutional doctrine.

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<sup>29</sup> See, e.g., *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting); *id.* at 1970 (Thomas, J., dissenting); *Stern v. Marshall*, 564 U.S. 462, 483–84 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 43–46 (1989); *N. Pipeline Constr. Co v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring).

<sup>30</sup> See *Wellness Int'l*, 135 S. Ct. at 1970 (Thomas, J., dissenting); James E. Pfander, *Article I Tribunals, Article III Courts and The Judicial Power of the United States*, 118 HARV. L. REV. 643, 721, 729 (2004); John A. E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in the Bankruptcy Courts*, 91 AM. BANKR. L.J. 311, 323 (2017) (arguing that decisions of commissioners were subject to confirmation by Chancellor or the law courts).

<sup>31</sup> See *In re City of Detroit*, 838 F.3d 79 at 811–12 (Moore, J., dissenting); *In re One2One*, 805 F.3d at 444 & n.10 (Krause, J., concurring).

<sup>32</sup> In this way, equitable mootness is quite similar to third party releases. Just like equitable mootness, third party releases are viewed as necessary to facilitate complex bankruptcy cases, *SEC v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992), while they lack statutory support, *In re SunEdison, Inc.*, 576 B.R. 453, 462 (Bankr. S.D.N.Y. 2017); *In re Transit Grp., Inc.*, 286 B.R. 811, 815–16 (Bankr. M.D. Fla. 2002) and are constitutionally questionable based on Article III, see *In re Millennium Lab Holdings II, LLC*, 242 F. Supp. 3d 322, 339 (D. Del. 2017) (asserting that third party releases covering common law claims likely abridge right to a final judgment by an Article III judge because they tantamount to final judgments entered by a bankruptcy judge).

<sup>33</sup> See *infra* Part II.

<sup>34</sup> See e.g., *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 881 (9th Cir. 2012); *Carrega v. Grubb & Ellis Co. (In re Grubb & Ellis Co.)*, 523 B.R. 423, 441 (S.D.N.Y. 2014); *RM 18 Corp. v. Aztex Assocs., L.P. (In re Malese 18 Corp.)*, 426 B.R. 44, 49 (E.D.N.Y. 2010).

This solution is not pie in the sky. The four-factor test for a stay pending appeal under Federal Rule of Bankruptcy Procedure 8007<sup>35</sup> is a product of traditional judicial gloss.<sup>36</sup> Although the Supreme Court has confirmed the four factors, it has not delineated the exact boundaries of the factors because they “contemplate individualized judgments in each case.”<sup>37</sup> This flexibility leaves room for the modified test for bankruptcy appeals. The third factor in the traditional test is “whether issuance of the stay will substantially injure the other parties interested in the proceeding.”<sup>38</sup> When a stay pending appeal is sought in a bankruptcy case, this factor should consider non-parties to the appeal who could be injured by reversal. Some courts have already considered the effect on non-appellee creditors as part of the stay pending appeal inquiry.<sup>39</sup>

This Article will proceed by first canvassing the various justiciability doctrines and their intersection with stays pending appeal. Next, it summarizes history of equitable mootness starting with its pre-Bankruptcy Code origins and then overviews the current status of equitable mootness across the courts of appeal. It then analyzes the various critiques of equitable mootness while focusing on its violation of Article III, which has not been evaluated prior to this Article. To conclude, this Article will argue for altering the stay pending appeal standard to include the concerns central to equitable mootness. This solution incorporates the concerns supporting equitable mootness but repackages them in a form that is fairer, unquestionably constitutional, and supported by the relevant statute.

## I. CONSTITUTIONAL MOOTNESS AND STAY PENDING APPEAL

Before there was equitable mootness, there was constitutional mootness and an appellant’s right to seek a stay pending appeal. Surveying the latter two is necessary to understanding the first. Article III of the Constitution limits federal courts to adjudicating only live cases and controversies.<sup>40</sup> This is true at not only the trial court level but at all stages of appellate review.<sup>41</sup> Constitutional mootness is among the prudential doctrines created by judges to ensure the live case and controversy requirement is met.<sup>42</sup> A court inquires whether further proceedings can affect the

<sup>35</sup> FED. R. BANKR. P. 8007.

<sup>36</sup> See *Nken v. Holder*, 556 U.S. 418, 434 (2009) (discussing the traditional principles involved in a decision to grant a stay pending appeal).

<sup>37</sup> *Id.* at 433–34 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)).

<sup>38</sup> *Id.* at 434 (quoting *Hilton*, 481 U.S. at 776). Other courts compared the injury to the appellant if the order is not stayed to the injury to the appellee if the stay is granted, a “balance of the hardships.” *E.g.* *In re Gardens Reg’l Hosp. and Mod. Cntr., Inc.*, 567 B.R. 820, 832 (Bankr. C.D. Cal. 2017).

<sup>39</sup> See, e.g., *In re Alpha Nat. Res., Inc.*, 556 B.R. 249, 264 (Bankr. E.D. Va. 2016); *In re W.R. Grace & Co.*, 475 B.R. 34, 208 (D. Del. 2012); *In re Williamson*, 414 B.R. 892, 895 (Bankr. S.D. Ga. 2009); *In re Lykes Bros. S.S. Co.*, 221 B.R. 881, 885 (Bankr. M.D. Fla. 1997).

<sup>40</sup> See U.S. CONST., art. III, § 2, cl. 1; *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 20–21 (1994); *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990).

<sup>41</sup> *U.S. Bancorp*, 513 U.S. at 21; *Lewis*, 494 U.S. at 477.

<sup>42</sup> The other best-known limitations are ripeness, standing, the political question doctrine and the prohibition on advisory opinions. *Keitel v. Mazurkiewicz*, 729 F.3d 278, 280 (3d Cir. 2013).



subject matter of the proceeding.<sup>43</sup> When an event occurs rendering it impossible for a court to grant any effective relief, the case becomes moot and it must be dismissed without the merits being heard.<sup>44</sup> No controversy exists when no effective relief can be granted.<sup>45</sup> This is true no matter the stakes. To wit, the Supreme Court dismissed the appeal of the Section 363 sale of Chrysler's assets because the appeal was moot.<sup>46</sup> While justice imposed by Constitutional mootness may seem rough, it is mitigated by the narrowness of its application. It only arises when no effective relief can be fashioned.<sup>47</sup> If some effective relief is possible, the appeal is not moot, and it should proceed.<sup>48</sup>

Constitutional mootness often arises when actions approved by a trial court are consummated and the remedy sought by the appellant becomes either impossible or impracticable to obtain.<sup>49</sup> One way for an appellant to forestall this fate is to obtain a stay pending appeal.<sup>50</sup> If an appellant successfully obtains a stay, the status quo will be preserved along with the appellant's opportunity to obtain a remedy.<sup>51</sup> Rule 8 of the Federal Rules of Appellate Procedure and its analog, Rule 8007 of the Federal Rules of Bankruptcy Procedure, govern the process of obtaining a stay of a judgment or order.<sup>52</sup> Ordinarily, both require the initial motion to be brought at the trial court level—district court for Rule 8<sup>53</sup> and bankruptcy court for the Rule 8007.<sup>54</sup> Upon the trial court's determination on a stay motion, the appellant may petition the appellate court to modify or vacate the trial court's order<sup>55</sup> or even petition the circuit justice for a stay.<sup>56</sup>

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<sup>43</sup> *Mills v. Green*, 159 U.S. 651, 653 (1895).

<sup>44</sup> *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (citing *Mills*, 159 U.S. at 653). Constitutional mootness may be raised *sua sponte*. *Medberry v. Crosby*, 351 F.3d 1049, 1053–54 & n.3 (11th Cir. 2003) (holding that, because mootness “strikes at the heart of federal subject matter jurisdiction” it may be raised *sua sponte*) (quoting *Sannon v. United States*, 631 F.2d 1247, 1250 (5th Cir. 1980)).

<sup>45</sup> See *Mills*, 159 U.S. at 653.

<sup>46</sup> See *Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009) (per curiam) (granting cert. but ordering lower court to dismiss appeal regarding sale of substantially all the assets of automaker Chrysler LLC); *Ind. State Police Pension Tr. v. Chrysler LLC* (*In re Chrysler LLC*), 576 F.3d 108, 112 (2d Cir. 2009).

<sup>47</sup> *Church of Scientology*, 506 U.S. at 12–13.

<sup>48</sup> *Id.* at 12–14; see also *Golfland Ent. Ctrs., Inc. v. Peak Inv., Inc.* (*In re BCD Corp.*), 119 F.3d 852, 856 (10th Cir. 1997); *Resolution Tr. Corp. v. Swedeland Dev. Grp., Inc.* (*In re Swedeland Dev. Grp., Inc.*), 16 F.3d 552, 560 (3d Cir. 1994) (en banc).

<sup>49</sup> See *Sullivan Cent. Plaza, I, Ltd. V. BancBoston Real Estate Capital Corp.* (*In re Sullivan Cent. Plaza, I, Ltd.*), 914 F.2d 731, 733 (5th Cir. 1990).

<sup>50</sup> *Id.*

<sup>51</sup> See *Veasey v. Abbott*, 870 F.3d 387, 392 (5th Cir. 2017).

<sup>52</sup> FED. R. APP. P. 8; FED. R. BANKR. P. 8007.

<sup>53</sup> FED. R. APP. P. 8.

<sup>54</sup> FED. R. BANKR. P. 8007.

<sup>55</sup> This is the Court of the Appeals in the case of an appeal from the district court sitting as a trial court. FED. R. APP. P. 8. In a bankruptcy case, it could be the district court, bankruptcy appellate panel or even the court of appeals if a direct appeal is sought. See Fed. R. Bankr. P. 8007(b).

<sup>56</sup> See *Motor Vehicle Cas. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 677 F.3d 869, 881 (9th Cir. 2012); *In re Highway Truck Drivers & Helpers Local Union # 107*, 888 F.2d 293, 297 (3d Cir. 1989) (citing *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)). Supreme Court Rule 23

Because a proponent often seeks to quickly consummate a restructuring transaction following bankruptcy court approval,<sup>57</sup> it may be imperative to obtain a stay pending appeal to protect against constitutional mootness.<sup>58</sup> A paradigm example is the sale of securities following confirmation of a plan of reorganization.<sup>59</sup> The debtor-issuer will attempt to sell its securities as soon as possible after confirmation in order to raise cash to make payments under the plan.<sup>60</sup> If a stay is not obtained, the prevailing party may treat the bankruptcy court's order as final and consummate the transactions contemplated by the confirmed plan.<sup>61</sup> Without a stay, there may be no possible relief available to appellant (i.e. constitutional mootness) due to an inability to undo consummated transactions.<sup>62</sup>

Given the severity of constitutional mootness, the opportunity for an appellant to obtain a stay is a foundational component of the federal appellate system. Indeed, “[i]t has always been held . . . that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal.”<sup>63</sup> An appellant's request for a stay pending appeal requires a balancing of interests. On the one hand, the power to grant a stay pending appeal can protect against irreparable harm resulting from the enforcement of a judgment prior to its reversal (such as constitutional mootness).<sup>64</sup> On the other hand, any stay must also provide sufficient protection to the appellee against losses resulting from the stay if the appellate court confirms the lower court's judgment.<sup>65</sup>

Federal Rule of Bankruptcy Procedure 8007, the rule governing the process of obtaining a stay pending appeal from a bankruptcy court order, reflects this

governs requests for stay from a circuit justice. See *Frommert v. Conkright*, 639 F. Supp. 2d 305, 312–13 (W.D.N.Y. 2009) (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brenan, J., in chambers)). On at least one occasion, a circuit justice has stayed the implementation of a plan of reorganization. *In re Equitable Office Bldg. Corp.*, 72 S. Ct. 1086, 1087, 1090 (1946) (Reed, J., in chambers).

<sup>57</sup> Federal Rule of Bankruptcy Procedure 6004(h) provides that an order allowing a debtor to use, sell or lease property is stayed for 14 days, which provides an opportunity to seek a longer stay or an expedited appeal. See *Mission Prod. Holdings, Inc. v. Old Cold LLC*, (*In re Old Cold LLC*), 879 F.3d 376, 387 (1st Cir. 2018). It also expressly allows a court to waive the stay when there is a sufficient business necessity to close the transaction. *Id.*; *In re Boscov's, Inc.*, No. 08–11637(KG), 2008 WL 4975882, at \*2 (Bankr. D. Del. Nov. 21, 2008).

<sup>58</sup> See *In re Highway Truck Drivers Local Union*, 888 F.2d at 298 (“[I]n addition to those situations covered under 11 U.S.C. § 363(m) and § 364(e), a myriad of circumstances can occur that would necessitate the grant of a stay pending appeal in order to preserve a party's position”); *Lawrence v. Revere Copper and Brass Inc.* (*In re Revere Cooper & Brass Inc.*), 78 B.R. 17, 23 (S.D.N.Y. 1987) (“[I]t is ‘obligatory’ upon an appellant from a confirmation order to ‘pursue with diligence all available remedies to obtain a stay’ of the implementation of that order prior to the occurrence of comprehensive changes made in reliance on the unstayed order.”) (quoting *In re Roberts Farms*, 652 F.2d at 798).

<sup>59</sup> See, e.g., *In re Peabody Energy Corp.*, 582 B.R. 771, 775–76 (E.D. Mo. 2017).

<sup>60</sup> See *id.*

<sup>61</sup> *In re Toc Assocs., L.P.*, Civ. A. Nos. 92–6788, 92–6772, 92–6773, 92–6775, Bankruptcy No. 91–23375T, 1993 WL 276993, at \*1 (E.D. Pa. July 13, 1993).

<sup>62</sup> See *In re St. Johnsbury Trucking Co., Inc.*, 185 B.R. 687, 689–90 (S.D.N.Y. 1995).

<sup>63</sup> *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9–10 (1942) (footnote omitted). Indeed, the first Judiciary Act of 1789 contemplated an appellant's ability to obtain a writ of supersedeas and stay of execution. *Id.* at 10 n.4; see also *Slaughter-house Cases*, 77 U.S. 273, 275 (1869).

<sup>64</sup> *Scripps-Howard Radio*, 316 U.S. at 9; see also *Nken v. Holder*, 556 U.S. 418, 427 (2009).

<sup>65</sup> *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 23 (D.D.C. 2006).

balance.<sup>66</sup> This rule gives an appellant the option of either posting a *supersedeas* bond or moving for a stay pending appeal.<sup>67</sup> The first option ensures the appellant obtains a stay. A *supersedeas* bond is a bond that it is issued in an amount set by the court as sufficient to guarantee an appellee full recovery on its judgment if the appellant is unsuccessful on appeal.<sup>68</sup> Because the appellee is protected from harm when a *supersedeas* bond is posted, it effectuates a stay as a matter of right.<sup>69</sup> Many appellants either cannot post or choose not to post a *supersedeas* bond and try to obtain a stay without posting a bond.<sup>70</sup> Indeed, a complex bankruptcy plan can involve transactions with assets or equity value in the billions, without even considering the administrative expenses accruing every month. As a result, the associated *supersedeas* bond could also be in the billions.<sup>71</sup> Faced with such an onerous burden, appellants often argue a bond is unnecessary.<sup>72</sup>

Another way to conceptualize a motion for a stay pending appeal is by comparing it to its brethren, the motion for a preliminary injunction. The parallels are strong as “[b]oth can have the practical effect of preventing some action before the legality of that action has been conclusively determined.”<sup>73</sup> A preliminary injunction directs a party’s course of conduct prior to a determination on the merits related to the conduct.<sup>74</sup> A stay pending appeal halts the effect of an entry of an order while an appeal is heard on the merits of the order.<sup>75</sup> Given these similarities, it is unsurprising that the test for stay pending appeal and the test for a preliminary injunction are substantially similar.<sup>76</sup> Both also place the burden of persuasion on the party seeking the keep the status quo;<sup>77</sup> these burdens are heavy because they seek extraordinary

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<sup>66</sup> Federal Rule of Bankruptcy Procedure 8007 is the analog to Rule 8 of the Federal Rules of Appellate Procedure. *Credit One Bank, N.A. v. Anderson* (*In re Anderson*), 560 B.R. 84, 88 n.4 (S.D.N.Y. 2016).

<sup>67</sup> FED. R. BANKR. P. 8007.

<sup>68</sup> *N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 895 F. Supp. 83, 84 (E.D. Pa. 1995).

<sup>69</sup> *Frommert v. Conkright*, 639 F. Supp. 2d 305, 308 (W.D.N.Y. 2009).

<sup>70</sup> *See, e.g., id.* at 307.

<sup>71</sup> *See, e.g., In re Tribune Co.*, 477 B.R. 465, 478–80 (Bankr. D. Del. 2012). This is particularly true when the value of the estate could be diminished by the stay. *See ACC Bondholder Corp. v. Adelphia Commc’ns Corp. (In re Adelphia Commc’ns Corp.)*, 361 B.R. 337, 368 (S.D.N.Y. 2007). A party could appeal the amount of the bond as unreasonably high, however, an argument that the bond is prohibitively high without asserting a lower amount is still reasonable is unlikely to be successful. *See In re Tribune Media Co.*, 799 F.3d 272, 276 (3d Cir. 2015).

<sup>72</sup> *See, e.g., id.*

<sup>73</sup> *Nken v. Holder*, 556 U.S. 418, 428 (2009); *see also In re Convenience USA, Inc.*, 290 B.R. 558, 561 (Bankr. M.D.N.C. 2003) (“A motion for a stay pending appeal in a sense seeks injunctive relief because the movant is asking that an event be halted, i.e., that the court order that a judgment or order not go into effect.”).

<sup>74</sup> *Nken*, 556 U.S. at 428.

<sup>75</sup> *Id.* at 428–29 (2009). The Supreme Court distinguished between an injunction that is a “judicial process or mandate operating *in personam*” compared to a stay that “operates upon the judicial proceeding itself.” *Id.* at 428.

<sup>76</sup> *In re Convenience USA*, 290 B.R. at 561.

<sup>77</sup> *Nken*, 556 U.S. at 427.

relief “intru[ding] into the ordinary processes of administration and judicial review.”<sup>78</sup>

The test for stay pending appeal in a bankruptcy case does not differ from a typical civil case. Both apply a four-factor test:

(1) [W]hether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.<sup>79</sup>

Tradition, as confirmed by the Supreme Court’s opinion in *Nken v. Holder*, classifies the first two factors as the most important.<sup>80</sup> Moreover, an appellant must show more than a “possibility of relief” to satisfy the first factor and more than a possibility of irreparable injury to satisfy the second factor.<sup>81</sup> Beyond this guidance, the Supreme Court encouraged judicial discretion to make individualized determinations based upon each case’s factual circumstance.<sup>82</sup>

## II. EVOLUTION OF EQUITABLE MOOTNESS

Equitable mootness is a prudential limitation applied by appellate judges to dismiss an underlying appeal without even considering the merits.<sup>83</sup> This section explores the policy underpinnings and origins of this powerful doctrine.

Although prudential limitations are often applied in bankruptcy appeals, such limitations undermine the obligation of federal courts to exercise their jurisdiction fully. As Chief Justice Marshall admonished, a court has “no more right to decline

<sup>78</sup> *Id.* at 433–34.

<sup>79</sup> Compare *Id.* at 422, 433–34, 436 (discussing a stay of an alien removal appeal), with *United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc.*, No. 2:16–CV–00064–RDP, 2016 WL 470815, at \*1 (N.D. Ala. Feb. 8, 2016), *appeal dismissed* (Apr. 4, 2016) (discussing a stay of a bankruptcy appeal).

<sup>80</sup> *Nken*, 556 U.S. at 434.

<sup>81</sup> *Id.* at 434–35.

<sup>82</sup> *Id.* at 433–34. Among the unresolved issues concerning the test is whether a movant must satisfy all four factors or if a strong showing on one or both of the first two is sufficient. The Third Circuit, in the context of a bankruptcy appeal, adopted a sliding scale approach whereby a sufficient showing on the merits and irreparable harm triggers a balancing among the four factors. *In re Revel AC, Inc.*, 802 F.3d 558, 569–71 (3d Cir. 2015). This sliding scale approach has been rejected by other courts. See *id.* at 576–77 & n.3 (Schwartz, J., dissenting).

<sup>83</sup> *Ochadjeus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 798 (6th Cir. 2016). There are rare situations when a bankruptcy court will apply equitable mootness in a situation outside of an appeal such as a motion to dismiss an adversary proceeding seeking to revoke a chapter 11 plan confirmation. See, e.g., *Almeroth v. Innovative Clinical Solutions, Ltd. (In re Innovative Clinical Solutions, Ltd.)*, 302 B.R. 136, 140–41 (Bankr. D. Del. 2003). In any event, unlike constitutional mootness, which may be found *sua sponte*, a motion to dismiss is necessary for the application of equitable mootness. See *Minerals Techs., Inc. v. Novinda Corp. (In re Novinda Corp.)*, 585 B.R. 145, 152 (B.A.P. 10th Cir. 2018) (stating that the court declined to rule on the equitable mootness claim due to the lack of a motion to dismiss).

the exercise of jurisdiction which is given, than to usurp that which is not given.”<sup>84</sup> If a federal court possesses jurisdiction, its “obligation” to hear and decide a case is “virtually unflagging.”<sup>85</sup> In spite of this guidance, prudential limitations often foreclose parties’ rights to appeal the merits of a judgment by a bankruptcy court.<sup>86</sup> One may correctly assume the policy foundations of equitable mootness are strong.

The paramount policy concern reflected by equitable mootness is the protection of third parties’ interests who are not participating in the bankruptcy appeal.<sup>87</sup> Prejudice to third-parties from a reversal on appeal can always arise, but the multiplicity of parties affected by an appeal in a bankruptcy case amplifies this issue.<sup>88</sup> Unlike the principal parties to a bankruptcy case, who will be aware of the appeal and can ascertain its potential effects, a less sophisticated vendor or customer may suffer from an information asymmetry and simply learn that the transaction was approved without understanding the risks associated with an appeal. Equitable mootness can mitigate the unfairness to third parties who may not even know that a debtor’s very existence hinges upon the fate of appeal.<sup>89</sup>

Equitable mootness is also derived from the importance of finality to bankruptcy proceedings. Finality is vital to restoring third parties’ confidence in a debtor and allowing it to successfully emerge from bankruptcy.<sup>90</sup> The greater the chance the transactions will be undone, the less money parties may be willing to pay for the debtor’s securities or assets—a knock-on effect with the potential to endanger the viability of the debtor’s reorganization.<sup>91</sup> In contrast, when third parties are confident transactions will not be overturned, they will offer the debtor better commercial terms (less risk to price in) and be generally more interested in transacting with the debtor. Writ large, this can improve debtor’s prospects to reorganize and emerge from bankruptcy.<sup>92</sup> Even though this Article is critical of the doctrine of equitable mootness and argues for its elimination, these policy concerns are worthy of

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<sup>84</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

<sup>85</sup> *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S., 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

<sup>86</sup> Non-coincidentally, many of the same criticisms of equitable mootness listed in this Article also apply to the person aggrieved doctrine and, just like equitable mootness, the person aggrieved doctrine has not been confirmed by the Supreme Court. For a summary of the person aggrieved doctrine, consider, S. Todd Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 BAYLOR L. REV. 569 (2007).

<sup>87</sup> See *In re UNR Indust. Inc.*, 20 F.3d 766, 769–70 (7th Cir. 1994).

<sup>88</sup> See *In re Tri-State Bldg. Materials Co.*, 279 F. Supp. 1020, 1022 (D.S.D. 1968) (noting multiplicity of ill-informed parties often exist in a bankruptcy case).

<sup>89</sup> See *Grimes v. Genesis Health Ventures, Inc.* (*In re Genesis Health Ventures, Inc.*), 280 B.R. 339, 345–46 (D. Del. 2002) (explaining that a notice of appeal may not be sufficient notice to investors of the possibility of reversal).

<sup>90</sup> *Rochman v. Ne. Utils. Serv. Grp.* (*In re Pub. Serv. Co.*), 963 F.2d 469, 471–72 (1st Cir. 1992).

<sup>91</sup> See *In re UNR Indust.*, 20 F.3d at 770; see also *In re City of Detroit*, 838 F.3d at 798. In a similar law and economics vein, the allocation of the debtor’s assets may also be distorted in favor of parties who are less sensitive to risk of reversal and against those parties who can make the highest and best use of such assets. See *In re UNR Indust.*, 20 F.3d at 770.

<sup>92</sup> See *In re UNR Indust.*, 20 F.3d at 770; R. Jake Jumbeck, Comment, “Complexity” as the Gatekeeper for Equitable Mootness, 33 EMORY BANKR. DEV. J. 171, 172–73 (2016).

protection. The expanded stay pending appeal test suggested by this Article incorporates these concerns.

Equitable mootness evolved from the application of the constitutional mootness doctrine caused by failures to obtain stays pending appeals. As early as the 1898 Bankruptcy Act, courts recognized the potential for constitutional mootness arising from the unstayed issuance of public securities to third parties or sales of property to good faith purchasers.<sup>93</sup> In 1976, Federal Rule of Bankruptcy 805 was amended to codify existing law whereby “the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.”<sup>94</sup> An appellant could avoid the statutory mootness arising from Rule 805 by obtaining a stay pending appeal.<sup>95</sup>

Two Ninth Circuit decisions form the foundation of equitable mootness by moving beyond the traditional notions of mootness in order to rectify the inequity of reversal on third parties. In *Valley National Bank of Arizona v. Trustee of Westgate-California Corp.*, the appellants sought to reverse a merger between a public subsidiary of the debtor and another subsidiary.<sup>96</sup> The entities had consummated the merger following approval by the bankruptcy court and all of the public entities’ shares were either redeemed or exchanged for shares in the new surviving entity.<sup>97</sup> Instead of following the well-worn path of asserting the impossibility of undoing the merger, the court detoured and stressed the inequities of reversal. Namely, the current shareholders were not party to the appeal while the surviving company had been operating for two years since the merger.<sup>98</sup> Confirming its divergence from constitutional mootness, the court found “it difficult, if not impossible, to fashion an equitable remedy that would restore appellants to their former positions.”<sup>99</sup> Recall, a case is not constitutionally moot if the any effective relief can be granted, regardless of difficulty. The court retained a link with the traditional mootness analysis by requiring the appellants to have sought a stay pending appeal in order to avoid equitable mootness.<sup>100</sup>

Building on *Valley*, the Ninth Circuit applied equitable mootness for a second time in *In re Roberts Farms, Inc.*<sup>101</sup> The appellants, ironically two of the same parties from the *Valley* case, sought to reverse a bankruptcy court’s orders disallowing claims, approving a settlement, and confirming a plan.<sup>102</sup> The appellants failed miserably to follow proper appellate procedure. They not only attempted to obtain a stay from the district court rather than first properly applying for a stay from the

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<sup>93</sup> See *A & H Holding Corp. v. O’Donnell (In re Abingdon Realty Corp.)*, 530 F.2d 588, 590 (4th Cir. 1976); *Taylor v. Austrian*, 154 F.2d 107, 108 (4th Cir. 1946) (*per curiam*).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> *Valley Nat’l Bank of Ariz. v. Tr. of Westgate-Cal. Corp.* 609 F.2d 1274, 1276 (9th Cir. 1979).

<sup>97</sup> *Id.* at 1276.

<sup>98</sup> *Id.* at 1283.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 652 F.3d 793, 798 (9th Cir. 1981).

<sup>102</sup> *Id.* at 794.

bankruptcy judge, but they also filed a writ of mandamus with the district court in lieu of a direct appeal.<sup>103</sup> The stay and the writ were both denied by the district court.<sup>104</sup> Meanwhile, the plan was consummated and transactions contemplated by the plan were implemented.<sup>105</sup> The court's analysis confirmed the break from constitutional mootness and equitable mootness' relationship to the appellant seeking a stay pending appeal. First, the court categorized the appeal as moot because no stay had been obtained and the implementation of the plan could not be undone.<sup>106</sup> Second, the court relied upon the equitable mootness doctrine espoused in *Valley*.<sup>107</sup> The court described the doctrine as arising when "the failure to seek stays coupled with a substantial change of circumstances would justify dismissal of the appeal for lack of equity."<sup>108</sup> The appellant's poor efforts to seek a stay allowed the implementation of the plan and made it inequitable to reverse the transactions made in reliance upon the plan.<sup>109</sup> Immediately following the *Roberts Farm* opinion, adoption of the equitable mootness was slow, but it steadily accelerated in the 1990s.<sup>110</sup> Analyses in these early cases typically parroted *Roberts Farms* without adding any further rationales for the doctrine.<sup>111</sup>

### III. CURRENT STATUS OF EQUITABLE MOOTNESS

Judge Easterbrook's *In re UNR Industries, Inc.*, opinion diverged from the early articulations of equitable mootness as he highlighted why the term mootness poorly describes the doctrine of equitable mootness and articulated a textual defense of the doctrine.<sup>112</sup> Although certainly founded upon equity, mootness is an ill-chosen term to include in the doctrine's name.<sup>113</sup> Recall, mootness refers to a court's inability to grant relief rather than a court's unwillingness to grant relief.<sup>114</sup> Judge Easterbrook

<sup>103</sup> *Id.* at 794–95.

<sup>104</sup> *Id.* at 796.

<sup>105</sup> *See id.* at 796–97.

<sup>106</sup> *Id.* at 796–98.

<sup>107</sup> *Id.* at 798.

<sup>108</sup> *Id.* at 798. The Ninth Circuit would later reaffirm this test. *Salomon v. Logan (In re Int'l Envtl. Dynamics, Inc.)*, 718 F.2d 322, 325–26 (9th Cir. 1983).

<sup>109</sup> *In re Roberts Farms*, 652 F.3d at 798.

<sup>110</sup> The District of Columbia Circuit adopted the doctrine in 1986, *see In re AOV Indus., Inc.*, 792 F.2d 1140, 1147–50 (D.C. Cir. 1986), while the Eleventh Circuit adopted the doctrine in 1988, *see Miami Cntr. Ltd. P'ship v. Bank of New York*, 838 F.2d 1547, 1554–55 (11th Cir. 1988). The First, Second, Fifth and Seventh Circuits all adopted the doctrine in the early 1990s. *See Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994); *In re Chateaugay Corp.*, 988 F.2d 322, 325–26 (2d Cir. 1993); *In re Andreuccetti*, 975 F.2d 413, 417–19 (7th Cir. 1992); *Rochman v. Ne. Utils. Serv. Grp. (In re Public Serv. Co.)*, 963 F.2d 469, 471–72 (1st Cir. 1992).

<sup>111</sup> *See, e.g., Miami Cntr.*, 838 F.2d at 1554–57; *In re AOV Indus.*, 792 F.2d at 1146–50.

<sup>112</sup> *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

<sup>113</sup> *Bennett v. Jefferson Cty., Alabama*, 899 F.3d 1240, 1247 (11th Cir. 2018) ("The doctrine, then, does not reference actual mootness at all.").

<sup>114</sup> *See id.* ("There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness').").

does not suffer fools.<sup>115</sup> He bluntly charged the term equitable mootness as “misleading” and “banished” it from the Seventh Circuit.<sup>116</sup> Other courts have subsequently admitted mootness may be an inapt term but have retained it due to the frequency of its use.<sup>117</sup>

Turning to the text of the Bankruptcy Code for support of the doctrine, Judge Easterbrook listed a number of provisions “provid[ing] that courts should keep their hands off consummated transactions.”<sup>118</sup> Two sections, 11 U.S.C. §§ 363(m) and 364(e), “restrict the results of a reversal or modification of a bankruptcy court’s order authorizing a sale or lease” or extension of credit,<sup>119</sup> while another, 11 U.S.C. § 1127(b), more generally supports the finality of plan confirmation. Section 363(m) (the successor to Rule 805) precludes the reversal of an order authorizing the sale or lease of estate property from affecting a transaction with a good faith purchaser or lessor, unless the appellant obtains a stay pending appeal.<sup>120</sup> The merits of the appeal are immaterial if the purchaser or lessor acted in good faith and the appellant failed to obtain a stay.<sup>121</sup> Section 364(e), provides the same treatment for post-petition credit extended or liens granted.<sup>122</sup> Section 1127(b) is based upon the same concerns as it limits a bankruptcy court’s authority to modify a confirmed plan of reorganization after it has been substantially consummated.<sup>123</sup> Judge Easterbrook summarized the policy basis for these provisions as “preserving interests bought and paid for in reliance on judicial decisions, and avoiding the pains that attend any effort to unscramble an egg.”<sup>124</sup> Given the importance of this policy and the examples of it in the Code, Judge Easterbrook found it obvious that equitable mootness filled an interstice, a gap, in the Code by allowing an appellate court to determine whether it was “prudent”—the appropriate term given it is judge-made—to upset a plan of reorganization or other complex transaction on appeal.<sup>125</sup>

Following *UNR*, many courts copied its analysis but still struggled to coalesce around a single test or a group of factors to evaluate equitable mootness. The Third

<sup>115</sup> See, e.g., *In re Kmart Corp.*, 359 F.3d 866, 868 (7th Cir. 2004) (skewering bankruptcy court’s entry of critical vendor order without legal or factual analysis with the exception of “some sketchy representations by counsel plus unhelpful testimony by Kmart’s CEO”).

<sup>116</sup> *In re UNR Indus.*, 20 F.3d at 769.

<sup>117</sup> See, e.g., *In re Cont’l Airlines*, 91 F.3d 553, 559 (3d Cir. 1996).

<sup>118</sup> *In re UNR Indus.*, 20 F.3d at 769.

<sup>119</sup> *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998).

<sup>120</sup> See *In re UNR Indus.*, 20 F.3d at 769; *Mission Prod. Holdings, Inc., v. Old Cold LLC (In re Old Cold LLC)*, 879 F.3d 376, 383 (1st Cir. 2018) (“The effect of this provision is to render statutorily moot any appellate challenge to a sale that is both to a good faith purchaser, and not stayed.”).

<sup>121</sup> See *In re Old Cold*, 879 F.3d at 388 (“We need not—and do not—consider this challenge to the propriety of the sale. As we have explained, section 363(m) applies even if the bankruptcy court’s approval of the sale was not proper, as long as the bankruptcy court was acting under section 363(b).”).

<sup>122</sup> See *Shapiro v. Saybrook Mfg. Co. (In re Saybrook Mfg. Co.)*, 963 F.2d 1490, 1492–93 (11th Cir. 1992) (“The purpose of this provision is to encourage the extension of credit to debtors in bankruptcy by eliminating the risk that any lien securing the loan will be modified on appeal.”).

<sup>123</sup> See *In re UNR Indus.*, 20 F.3d at 769.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*



Circuit exemplifies the uncertainty surrounding the exact composition of the test.<sup>126</sup> It originally adopted a five factor test for equitable mootness in *In re Continental Airlines*: “(1) [W]hether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.”<sup>127</sup> The Third Circuit subsequently recognized that these factors are too interconnected and overlapping.<sup>128</sup> The first and second overlap because substantial consummation cannot occur if a stay is successfully obtained.<sup>129</sup> Similarly, the fourth factor duplicates the first because “it considers whether granting the appellant the requested relief would unravel the plan,” a result that could not be obtained absent substantial consummation.<sup>130</sup> Given these shortcomings, the Third Circuit synthesized a new test: “(1) [W]hether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.”<sup>131</sup> Other circuits have embraced different tests ranging from the three factors of the Fifth Circuit to the five factors of the Second Circuit to the six factors of the Tenth Circuit.<sup>132</sup>

In spite of the divergence among the circuits’ tests, they generally focus on four considerations: (i) whether the appellant sought a stay pending appeal; (ii) whether the plan or transaction has been substantially consummated; (iii) third parties’ reliance upon the transaction or plan; and (iv) whether equitable and effective relief can be granted to the appellant.<sup>133</sup> Each factor is worthy of further examination.

### A. Stay Pending Appeal

Although seeking a stay pending appeal is neither strictly necessary nor sufficient to preclude equitable mootness,<sup>134</sup> diligently seeking a stay makes the appellate court much less likely to conclude a matter is equitably moot.<sup>135</sup> The importance of this

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<sup>126</sup> The Third Circuit enjoys preeminence as the appellate court for appeals from the District of Delaware where an outsized number of large and complex (read candidates for equitable mootness) bankruptcy cases are filed and, as a result courts outside of the circuit will often rely on its rulings.

<sup>127</sup> *In re Cont’l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996).

<sup>128</sup> See *In re Phila. Newspapers, LLC*, 690 F.3d 161, 168–69 (3d Cir. 2012).

<sup>129</sup> *Id.* at 169.

<sup>130</sup> *Id.*

<sup>131</sup> *Samson Energy Res., Co. v Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 321 (3d Cir. 2013).

<sup>132</sup> Compare *Search Mkt. Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339 (10th Cir. 2009) with *Wooley v. Faulkner (In re SI Restructuring, Inc.)*, 542 F.3d 131, 136 (5th Cir. 2008), and *In re BGI, Inc.*, 772 F.3d 102, 108 (2d Cir. 2005).

<sup>133</sup> See, e.g., *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002); *Olympic Coast Inv., Inc. v. Crum (In re Wright)*, Nos. MT–08–1164–MoDH, 05–61714, 2008 WL 8462954, at \*4 (B.A.P. 9th Cir. Nov. 3, 2008).

<sup>134</sup> *Ochadleus v Detroit (In re City of Detroit)*, 838 F.3d 792, 798–99 (6th Cir. 2016).

<sup>135</sup> See *JPMCC 2007–C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161, 1168 (9th Cir. 2015).

factor dates back to the *Roberts Farm* case and the origins of equitable mootness.<sup>136</sup> A failure to seek a stay pending appeal from each available court, including the Circuit Justice, increases the likelihood of equitable mootness.<sup>137</sup> Even though a failure to request a stay and a denied request have the same result,<sup>138</sup> failure to diligently attempt to obtain a stay weighs more heavily in favor of equitable mootness.<sup>139</sup>

### B. Substantial Consummation

Unlike the other factors, substantial consummation is defined by the Bankruptcy Code. It occurs when a three part test is satisfied:

(A) [T]ransfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.<sup>140</sup>

The importance of this factor can be paramount. For instance, in the Second Circuit, when a plan is substantially consummated, it is presumed that the appeal is equitably moot.<sup>141</sup> Unfortunately for the appellant, the plan proponent, not the appellant, controls the timing of substantial consummation.<sup>142</sup> This authority may allow a proponent “‘stack the deck’ in its favor to expedite implementation of its plan.”<sup>143</sup> Among the cards a plan proponent may play include not only the possibility of an accelerated closing, but also the waiver of the requirement of a final order as a

<sup>136</sup> See *supra* notes 101–109 and accompanying text.

<sup>137</sup> *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 186–87 (3d Cir. 2001) (“it ‘is obligatory upon appellant . . . to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order (even to the extent of applying to the Circuit Justice for relief . . .), if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.” (quoting *In re Highway Truck Drivers & Helpers Local Union # 107*, 888 F.2d 293, 297 (3d Cir. 1989)); see also *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 881 (9th Cir. 2012) (“[T]his is not a case where Appellants sat on their rights; they sought a stay and were refused both by us and by the Circuit Justice.”).

<sup>138</sup> See *Nordhoff Invs., Inc. v. Zenith Elecs. Corp. (In re Zenith Elecs. Corp.)*, 250 B.R. 207, 215 (D. Del. 2000).

<sup>139</sup> *Id.* Diligence can also be manifested in the context of the bond requirement for stay pending appeal. Although a party may disagree with the required bond amount, a failure to contest its reasonableness may also be viewed as a lack of diligence. *In re Tribune Media Co.*, 799 F.3d 272, 282 (3d Cir. 2015).

<sup>140</sup> 11 U.S.C. § 1101(2) (2012).

<sup>141</sup> *Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, LLC)*, 874 F.3d 787, 804 (2d Cir. 2017); *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005).

<sup>142</sup> Ryan M. Murphy, *Equitable Mootness Should Be Used as a Scalpel Rather than an Axe in Bankruptcy Appeals*, 19 NORTON J. BANKR. L. & PRAC. 33 (2010).

<sup>143</sup> *Id.*

precondition for the plan effective date.<sup>144</sup> Although closing without a final order prevents the closing party from knowing whether the order will be appealed, proponents will weigh this risk against the greater chances of equitable mootness based on the substantial consummation of the plan.<sup>145</sup> Naturally, the more heavily weighted this factor, the more willing a party will be to “close over” the appeal or otherwise attempt to accelerate substantial consummation.<sup>146</sup>

### C. Third Party Reliance

Although all courts anchor equitable mootness to third parties’ reliance, they disagree on which parties’ reliance interests should be protected.<sup>147</sup> On the one hand, the doctrine’s protections can apply to any entities who are not named parties to the pending appeal.<sup>148</sup> Proponents of this broad view suggest that it does not value one category of entities above others while it still limits gamesmanship, a frequent criticism of equitable mootness.<sup>149</sup> The possibility of evading appellate review will incentivize the parties to a potential appeal to press more aggressive provisions knowing they may only need to pass one crucible—the bankruptcy court—rather than two, three or even four, if the plan is appealed to the Supreme Court.<sup>150</sup> In other words, when plan proponents and their allies can use equitable mootness as a sword, it alters parties’ ability to use an appeal as shield to obtain negotiating leverage.<sup>151</sup> On the other hand, some courts have only protected the reliance interests of parties who have a sufficient impact on the success of the transaction or the debtor’s reorganization.<sup>152</sup> This view categorizes vendors, customers, and lenders as among the appropriate beneficiaries, but the most befitting class is investors.<sup>153</sup> Absent the inflows from investors to recapitalize the debtor, the windup of the estate and

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<sup>144</sup> See Official Comm. of Unsecured Creditors v. SGPA, Inc. (*In re* SGPA, Inc.), 34 F. App’x 49, 53 (3d Cir. 2002); Search Mkt. Direct, Inc. v. Jubber (*In re* Paige), No. 2:07–CV–822 TS, 2008 WL 2064628, at \*5 (D. Utah May 13, 2008), *rev’d*, 584 F.3d 1327 (10th Cir. 2009).

<sup>145</sup> Dennis J. Connolly & Sage M. Sigler, *The Issue is Moot. Or is it? Rethinking the Application of Equitable Mootness in Bankruptcy Appeals*, 2016 ANN. SURV. BANKR. LAW (2016).

<sup>146</sup> *Id.*

<sup>147</sup> See generally David S. Kupetz, *Equitable Mootness: Prudential Forbearance from Upsetting Successful Reorganizations or Highly Problematic Judge-Made Abstention Doctrine*, 25 NORTON J. BANKR. L. & PRAC. (2016) (discussing how courts disagree on whose reliance interests should be protected).

<sup>148</sup> See JPMCC 2007–C1 Grasslawn Lodging, LLC v. Transwest Resort Props. Inc. (*In re* Transwest Resort Props., Inc.), 801 F.3d 1161, 1170 (9th Cir. 2015).

<sup>149</sup> Indeed, if a sophisticated party “helps craft a reorganization plan that ‘press[es] the limits’ of the bankruptcy laws, appellate consequences are a foreseeable result.” *Id.* (quoting Bank of N.Y. Tr. Co. v. Official Unsecured Creditors’ Comm. (*In re* Pac. Lumber Co.), 584 F.3d 229, 244 (5th Cir. 2009)).

<sup>150</sup> See *In re One2One Commc’ns., LLC*, 805 F.3d 428, 447–48 (3d Cir. 2015) (Krause, J., concurring) (“[E]quitable mootness merely serves as part of a blueprint for implementing a questionable plan that favors certain creditors over others without oversight by Article III judges.”).

<sup>151</sup> Some cases have worried that the doctrine disincentivizes bargaining. See *Transwest Resort*, 801 F.3d at 1170 n.11. But, it actually just shifts the fulcrum point of leverage for negotiations, which may encourage or discourage negotiations depending on the factual circumstances.

<sup>152</sup> See *In re Tribune Media Co.*, 799 F.3d 272, 279 (3d Cir. 2015).

<sup>153</sup> See *id.*

emergence of the debtor may be impossible.<sup>154</sup> Thus, some courts are particularly sensitive to the potential hardship caused by reversal to this group.<sup>155</sup>

#### *D. Availability of Equitable and Effective Relief*

Although equitable mootness is not equivalent to constitutional mootness, it still evaluates whether effective and equitable relief can be fashioned for the benefit of the appellant.<sup>156</sup> As part of the equitable mootness inquiry, this factor considers the limitations on the appellant's available relief and the impact of such relief on the transaction.<sup>157</sup> The easier it is for the court to compartmentalize the effect of reversal and the more significant the relief available, the more this factor will support the appellant.<sup>158</sup> Restructuring transactions may involve the issuance of public securities, mergers, debt for equity swaps, and other industry-specific complexities.<sup>159</sup> Each of these permutations may be extremely difficult, if not impossible, to undo completely when approval of the transaction is reversed. The issuance of publicly traded securities provides a clear illustration. Undoing the issuance of publicly traded securities issued as consideration for claims against the debtor would require not only cancellation of the equity consideration and the reinstatement of the debts but also the undoing of thousands of trades involving the securities.<sup>160</sup> Even in this situation, partial relief may still be available. The court could require sellers of the securities to turn over the sales proceeds to the successful appellants; the appeal would not be constitutionally moot.<sup>161</sup> Having summarized the doctrine's origins, pragmatic value, and its current state, this Article now turns to the laundry list of infirmities.

### IV. STATUTORY CRITIQUES

One of the most frequent criticisms of equitable mootness is its omission from the Bankruptcy Code even though Congress enacted other appellate mootness provisions. One well-known canon of statutory interpretation is *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others").<sup>162</sup> Applying this canon, "where Congress includes particular language in one section of

<sup>154</sup> *Id.* at 279–80.

<sup>155</sup> *See id.* at 279.

<sup>156</sup> *See* Schaefer v. Superior Offshore Int'l, Inc. (*In re* Superior Offshore Int'l Inc.), 591 F.3d 350, 353–54 (5th Cir. 2009).

<sup>157</sup> *See id.* at 353.

<sup>158</sup> *See id.* at 353–54 ("Remedies can be crafted for these deficiencies without completely undoing the Plan.").

<sup>159</sup> *See* Jumbeck, *supra* note 92, at 194–99.

<sup>160</sup> *See* Alsohaibi v. Arcapita Bank B.S.C.(c) (*In re* Arcapita Bank B.S.C.(c)), Nos. 13 Civ. 5755(SAS), 13 Civ. 5756(SAS), 2014 WL 46552, at \*7 (S.D.N.Y. Jan. 6, 2014).

<sup>161</sup> *See, e.g., In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (Posner, J.) ("Some of the 14% noteholders, it is true, have already sold their stock, but they could be ordered to surrender some or all of the proceeds to the appellants.").

<sup>162</sup> *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014).

a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”<sup>163</sup> In other words, “where Congress knows how to say something but chooses not to, its silence is controlling.”<sup>164</sup> The enactment of other statutory mootness provisions in the Code suggests Congress did not intend courts to recognize prudential or equitable-based mootness.<sup>165</sup>

Congress enacted appellate mootness provisions in the Code to limit the effect of a reversal of orders granting a section 363 sale and the issuance of post-petition debt pursuant to section 364.<sup>166</sup> When good faith parties purchase assets free and clear from a debtor or issue post-petition credit to a debtor, sections 363(m) and 364(e) respectively shield them from a reversed appeal, if the relevant order is not stayed pending appeal.<sup>167</sup> Only by obtaining a stay pending appeal can an appellant reverse the transaction without fear of statutory mootness.<sup>168</sup> The policy supporting these statutory mootness provisions mirrors equitable mootness: promotion of the finality of bankruptcy courts and protection of the reliance interests of third parties.<sup>169</sup> Other transactions are simply not protected by an analog to sections 363(m) and 364(e).<sup>170</sup> Given that Congress clearly understands how to draft such provisions and the policy they support, “it is not for courts to alter the balance struck by the statute.”<sup>171</sup> Equitable mootness ignores this maxim. Courts should question the existence of equitable mootness given Congress’ decision to enact only certain specific statutory mootness provisions rather than enact a broader provision akin to equitable mootness.

The failure to enact equitable mootness is not an interstice in the Bankruptcy Code. Gap filling is only appropriate when “Congress ‘ambiguously addresses’ an issue in general terms” and purposely leaves gaps to be filled through judicial

<sup>163</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello v. United States* 464 U.S. 16, 23 (1983)).

<sup>164</sup> *Rogers v. Freeman (In re Freeman)*, 527 B.R. 780, 793 (Bankr. N.D. Ga. 2015) (quoting *Lindley v. FDIC*, 733 F.3d 1043, 1056–57 (11th Cir. 2013)).

<sup>165</sup> See *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 809–10 (6th Cir. 2016) (Moore, J., dissenting).

<sup>166</sup> 11 U.S.C. §§ 363(m), 364(e) (2012); see also *In re One2One Commc’ns., LLC*, 805 F.3d 428, 443 (3d Cir. 2015) (Krause, J., concurring).

<sup>167</sup> See, e.g., *In re Revel AC, Inc.*, 802 F.3d 558, 566 (3d Cir. 2015) (discussing section 363(m)); *Burchinal v. Cen. Wash. Bank (In re Adams Apple, Inc.)*, 829 F.2d 1484, 1488 (9th Cir. 1987) (discussing section 364(e)). The policy justification of these sections is that they help overcome parties’ reluctance to transact with a debtor by “permitting reliance on a bankruptcy judge’s authorization.” *Id.*

<sup>168</sup> The majority view automatically moots an unstayed appeal. *Parker v. Goodman (In re Parker)*, 499 F.3d 616, 621 (6th Cir. 2007) (citing cases). Even the minority view espoused by the Third, Sixth and Tenth Circuits protects counterparties by granting mootness when effective relief will impact the validity of the transaction. See *Schepis v. Burtch (In re Pursuit Capital Mgmt., LLC)*, 874 F.3d 124, 135 (3d Cir. 2017); *Brown v. Ellmann (In re Brown)*, 851 F.3d 619, 622 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 328 (2017); *C.O.P. Coal Dev. Co. v. C.W. Mining Co. (In re C.W. Mining Co.)*, 641 F.3d 1235, 1239 (10th Cir. 2011).

<sup>169</sup> See *Schepis*, 874 F.3d at 133–34.

<sup>170</sup> *In re Toc Assocs., L.P.*, Civ. A. Nos. 92-6788, 92-6772, 92-6773, 92-6775, Bankruptcy No. 91-23375T, 1993 WL 276993, at \*1 (E.D. Pa. July 13, 1993).

<sup>171</sup> *Law v. Siegel*, 571 U.S. 415, 427 (2014).

discretion.<sup>172</sup> Otherwise, judges are usurping Congress' authority and upsetting the balance of the separation of powers.<sup>173</sup> Simply put, when no intentional gaps exist, "[a court] may not stretch a statute to create such gaps."<sup>174</sup> There is no evidence that Congress enacted sections 363(m) and 364(e), while also leaving a gap for equitable mootness to fill.<sup>175</sup>

Indeed, the overlap between the statutory mootness provisions and equitable mootness makes the existence of an interstice even more unlikely. Although equitable mootness will not shield every transaction protected by sections 363(m) or 364(e), many transactions will be covered by both.<sup>176</sup> This overlap violates another canon of statutory construction: the avoidance of interpretations that render statutory language superfluous.<sup>177</sup> Why would Congress ever have enacted section 363(m) or 364(e) when they are swallowed whole by equitable mootness?

#### V. IT'S NOT REALLY MOOTNESS, IT'S JUST PRUDENCE AND EQUITY

Judge Posner suggested that equitable mootness "is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."<sup>178</sup> Although undoubtedly true, equity is by its nature fact-intensive and the full development of parties' positions is a prerequisite for equitable determinations.<sup>179</sup> Trial courts are properly tasked with fact-intensive equitable determinations; "determining equities in the first instance is seldom fit grist for the appellate mill."<sup>180</sup> Even though it is sitting in appellate jurisdiction, the district court is without the benefit of the

<sup>172</sup> *Indian Motorcycle Assocs. III Ltd. P'ship v. Mass. Hous. Fin. Agency*, 66 F.3d 1246, 1251 n.8 (1st Cir. 1995) (quoting *Conille v. Sec'y of HUD*, 840 F.2d 105, 110 n.6 (1st Cir. 1988)); see also *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 810 (6th Cir. 2016) (Moore, J., dissenting).

<sup>173</sup> *Cf. Ga. Power Co. v. Sanders*, 617 F.2d 1112, 1127–28 (5th Cir. 1980) (Fay, J., concurring) (stating that there are no separation of powers concern where federal common law rules properly existed).

<sup>174</sup> *In re One2One Commc'ns, LLC*, 805 F.3d 428, 444 (3d Cir. 2015) (Krause, J., concurring).

<sup>175</sup> See *Ochadleus*, 838 F.3d at 810 (Moore, J., dissenting).

<sup>176</sup> See, e.g., *Campbell v. Motors Liquidation Co. (In re Motors Liquidation Co.)*, 428 B.R. 43, 60 (S.D.N.Y. 2010) (providing that appeal was moot under both section 363(m) and equitable mootness). Moreover, instances of this overlap are likely underreported because when statutory mootness applies, courts will often fail to analyze an alternative argument of equitable mootness even though it may apply. See, e.g., *Contrarian Funds LLC v. Aretex LLC (In re Westpoint Stevens, Inc.)*, 600 F.3d 231, 253–54 (2d Cir. 2010).

<sup>177</sup> *In re Sundale, Ltd.*, 471 B.R. 300, 303 (Bankr. S.D. Fla. 2012) (citing *Nunnally v. Equifax Info. Servs., LLC*, 451 F.3d 768, 773 (11th Cir. 2006)); *In re Fairfield Sentry Ltd.*, 452 B.R. 52, 59 (Bankr. S.D.N.Y. 2011) (citing *United States v. Novak*, 476 F.3d 1041, 1048 (9th Cir. 2007)).

<sup>178</sup> *In re Envirodyne Indus., Inc.*, 29 F.3d 301, 304 (7th Cir. 1994) (Posner, C.J.); see also *In re Tribune Media Co.*, 799 F.3d 272, 287 (3d Cir. 2015) (Ambro, J., concurring) ("Our take is that, in the equitable mootness context, courts may consider whether it is fair in stark circumstances to grant relief that will scramble a consummated plan or will upset third parties' legitimate reliance on the finality of such a plan."); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986) ("Even when the moving party is not entitled to dismissal on article III grounds, common sense or equitable considerations may justify a decision not to decide a case on the merits.").

<sup>179</sup> *Quenzer v. United States (In re Quenzer)*, 19 F.3d 163, 165 (5th Cir. 1993).

<sup>180</sup> *Id.*

bankruptcy court's decision, let alone its fact-finding. It must make the equitable mootness determination in the first instance.<sup>181</sup> Given the district court's unfamiliarity with the case and a limited record on appeal, it is perhaps understandable if the district court is prone to believing the appellee's "parade of horrors" that will result from the possibility of reversal and remand.<sup>182</sup> To make matters worse, it is well-established that many district court judges lack interest in bankruptcy.<sup>183</sup> To summarize, equitable mootness requires an equitable determination by an appellate court, on a limited record, without the benefit of a trial court decision, who would rather not have the case.

Equitable mootness' continued popularity is surprising given that it is swimming against the current of anti-prudential Supreme Court opinions. A strong tension exists between doctrines based upon judicial discretion and the duty of federal courts to fully exercise their jurisdiction under statute and the Constitution.<sup>184</sup> Indeed, if subject matter jurisdiction exists, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"<sup>185</sup> This conclusion is natural, given bankruptcy jurisdiction, like all other species of federal jurisdiction, is limited to the bases prescribed by statute or the Constitution and otherwise does not exist.<sup>186</sup>

The Supreme Court has recently refused to confirm the continued vitality of ripeness<sup>187</sup> or standing<sup>188</sup> when they are based on prudence rather than a statute. The Court's discomfort likely stems from its unwillingness to undermine the balance of powers and defy the elected branches. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."<sup>189</sup> Recognizing the problems inherent in prudential limitations, the Supreme Court has sought to reallocate standing limitations like the zone of interests and the prohibition against generalized grievances into statutory or constitutional

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<sup>181</sup> This issue has also created uncertainty regarding the appropriate level of appellate review for a Circuit Court to apply. See generally Matthew D. Pechous, *Walking the Tight Rope and Not the Plank: A Proposed Standard for Second-Level Appellate Review of Equitable Mootness Determinations*, 28 EMORY BANKR. DEV. J. 547 (2012) (canvassing circuit courts' appellate review standards and asserting abuse of discretion is the appropriate standard).

<sup>182</sup> But see Selene Fin. LP v. Brown (*In re Brown*), 563 B.R. 451, 455 (D. Mass. 2017) ("Although Brown argues that remand would portend a 'nightmarish' scenario in the Bankruptcy Court, there is little or nothing to support a parade of horrors.").

<sup>183</sup> McKenzie, *supra* note 21, at 791-92.

<sup>184</sup> See Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013).

<sup>185</sup> *Id.* ("Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'") (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

<sup>186</sup> See Wasserman v. Immormino (*In re Granger Garage, Inc.*), 921 F.2d 74, 77 (6th Cir. 1990) ("The subject matter jurisdiction of the bankruptcy court is limited to that which Congress specifically grants.").

<sup>187</sup> Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2347 (2014).

<sup>188</sup> Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-26 (2014); see also *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat. Ass'n*, 758 F.3d 592, 603 n.34 (5th Cir. 2014) (interpreting *Lexmark*).

<sup>189</sup> *Lexmark*, 572 U.S. at 128 (citation omitted).

boxes rather than leave them as prudential limitations.<sup>190</sup> In the case of equitable mootness, neither of these options apply. Congress failed to incorporate it into the Bankruptcy Code.<sup>191</sup> Equitable mootness' very existence is predicated on its broader scope compared to constitutional mootness.<sup>192</sup> Nonetheless, equitable mootness has bucked this recent trend through a combination of inertia and its strong policy underpinnings.<sup>193</sup>

Attempts to characterize equitable mootness as a branch of mootness, abstention, waiver, or forfeiture fare no better. "There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness')." <sup>194</sup> Other courts have characterized it as a species of delayed adjudication like abstention and the common law *forum non conveniens*.<sup>195</sup> Equitable mootness, however, does not delay adjudication for another day in another court, it ends the matter by abdicating jurisdiction.<sup>196</sup> Still others have categorized the doctrine as a species of waiver or forfeiture.<sup>197</sup> These rationales are also flawed. Waiver and forfeiture are based upon the litigant's actions; waiver arises from a litigant's intentional relinquishment of a known right,<sup>198</sup> while forfeiture arises from a litigant's failure to timely assert a right.<sup>199</sup> The only equitable mootness factor under the appellant's control is whether they seek a stay pending appeal.<sup>200</sup> Given the existence of the other factors, waiver and forfeiture provide insufficient support for the doctrine.

The strategic value of equitable mootness promotes gamesmanship and encourages any party to invoke it no matter the chance of success. The failure to consider the merits may be normatively attractive at first glance; if the harm caused by a reversal is sufficient, the merits are immaterial.<sup>201</sup> This rationale must be

<sup>190</sup> Smith, Jr., *supra* note 3, at 875–76 (analyzing *Lexmark*). Professor Smith persuasively asserts that that the reallocation of prudential doctrines into new boxes—either statutory or constitutional—is both immaterial (the doctrines are still get applied) and dangerous (the doctrines have firmer support). *See id.* at 915 ("[T]here are significant reasons to doubt that recategorizing prudential rules will do much to facilitate representative democracy.").

<sup>191</sup> *See generally supra* Part IV.

<sup>192</sup> *See In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994).

<sup>193</sup> *See Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 800 (6th Cir. 2016).

<sup>194</sup> *In re UNR Indus.*, 20 F.3d at 769.

<sup>195</sup> *See, e.g., Samson Energy Res. Co. v. Semcrude, L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 317 (3d Cir. 2013).

<sup>196</sup> *In re One2One Commc'ns, LLC*, 805 F.3d 428, 440–41 (3d Cir. 2015) (Krause, J., concurring). The abstention provision in 28 U.S.C. § 1334(c)(1) allows a district court to abstain from hearing a bankruptcy proceeding pursuant to comity or the interest of justice. *Id.* at 442. This provision, however, only applies to district court's original jurisdiction under Title 11, rather than their appellate jurisdiction (which is implicated by equitable mootness). *Id.*

<sup>197</sup> *See, e.g., Ochadleus*, 838 F.3d at 798.

<sup>198</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Journe v. Journe*, 911 F. Supp. 43, 47 (D.P.R. 1995).

<sup>199</sup> *Yakus v. United States*, 321 U.S. 414, 444 (1944). For a discussion of waiver and forfeiture and its intersection with the constitutional and statutory jurisdiction of bankruptcy courts, consider, Robert Miller, *Nothing New: Consent, Forfeiture, and Bankruptcy Court Final Judgments*, 65 DRAKE L. REV. 89 (2017).

<sup>200</sup> *See In re One2One*, 805 F.3d at 444 (Krause, J., concurring).

<sup>201</sup> *See id.* at 434 (majority opinion).



weighed against the unfairness to appellants whose appeals will never be determined on the merits<sup>202</sup> and use of equitable mootness as a sword by proponents of the complex transaction.<sup>203</sup> While appellants may have colorable or even winning arguments that will never be considered,<sup>204</sup> the proponents of the transaction will rationally rush to implement it and equitably moot any appeal.<sup>205</sup> This is particularly true when the proponents advocate legally questionable provisions.<sup>206</sup> Indeed, such tactics are now so commonplace that “a motion to dismiss an appeal as equitably moot has become ‘part of the Plan.’”<sup>207</sup> Appellees are only rationally reacting to the incentives provided by equitable mootness. Besides the cost of briefing the motion to dismiss, no other barrier exists to preclude an appellee from invoking the doctrine. Even when the chances of successfully dismissing the appeal are small, the benefit is so large compared to the cost that an appellee will rationally move for dismissal.

The problems inherent in the prudential nature of equitable mootness are perhaps best illustrated by its application to transactions involving complex settlements. Complex plans and transactions usually include a global settlement among all the main constituencies, which together with releases, injunctions, and exculpation provisions, facilitate finality among the parties and limit related third party claims.<sup>208</sup> Because they are often contentious, the global settlement or the associated protective provisions are frequently appealed if they are approved.<sup>209</sup> What naturally follows is the familiar refrain in motions to dismiss based upon equitable mootness—a reversal will throw the case into chaos and potentially make the debtor’s current path to emergence unviable.<sup>210</sup> This may be true, and the cost of a reversal may be high in terms of administrative expense and even endanger the viability of a reorganization.<sup>211</sup> Regardless, confirmation should never be granted if the appellant is correct on the merits and the settlement does not satisfy the applicable legal

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<sup>202</sup> See *id.*

<sup>203</sup> See *id.* at 446 (Krause, J., concurring); *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 185 (3d Cir. 2001); *id.* at 191 (Alito, J., concurring) (“It is disturbing that Zenith, in a seeming attempt to moot any appeal prior to filing, succeeded in implementing most of the plan before the appellants even received notice that the plan had been confirmed.”).

<sup>204</sup> See, e.g., *In re Cont’l Airlines*, 91 F.3d 553, 567–68 (3d Cir. 1996) (Alito, J., dissenting).

<sup>205</sup> See, e.g., *Bennett v. Jefferson Cty.*, 518 B.R. 613, 639 (N.D. Ala. 2014) (“This court is not inclined to dismiss Ratepayers’ appeal as ‘equitably moot’ based on the rush to consummation.”) (citing *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1343 (10th Cir. 2009)).

<sup>206</sup> *In re One2One*, 805 F.3d at 453 (Krause, J., concurring).

<sup>207</sup> *Id.* at 446. The problem of gamesmanship cannot be blamed on the litigants. Zealous representation requires appellees’ counsel to employ equitable mootness as efficiently as possible. A counsel should bake provisions into a plan that will increase the likelihood of a dismissal based on equitable mootness.

<sup>208</sup> See *Jumbeck*, *supra* note 92, at 214–16 (discussing *In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015), and *R<sup>2</sup> Invs., LDC v. Charter Commc’ns, Inc. (In re Charter Commc’n, Inc.)*, 691 F.3d 476 (2d Cir. 2012)).

<sup>209</sup> See, e.g., *Charter Commc’ns*, 691 F.3d at 479; *Coll. Props., II, Ltd. v. Mullen (In re Coll. Props., Ltd.)*, Nos. AZ–07–1075–PaAK, 05–10095, 05–15155 2007 WL 7540957, at \*1, \*4 (B.A.P. 9th Cir. Aug. 14, 2007).

<sup>210</sup> See, e.g., *In re Tribune Media*, 799 F.3d at 280–81; *Charter Commc’ns*, 691 F.3d at 485.

<sup>211</sup> See *Lynn M. LoPucki, The Trouble with Chapter 11*, 1993 Wis. L. REV. 729, 730 n.6 (“The direct costs of bankruptcy, primarily professional fees, are enormous.”).

standards.<sup>212</sup> Going back to the drawing board is the appropriate result even if the consequences for the debtor are dire.<sup>213</sup>

The costs of equitable mootness to the bankruptcy system itself are high. The lack of appeals in bankruptcy cases is well documented.<sup>214</sup> Whether due to dwindling resources, preference for negotiation over litigation, or the need for finality, few bankruptcy matters are appealed.<sup>215</sup> The importance of the few first-level appeals that do occur is further diminished because in some jurisdictions, first-level appeals may not even bind trial courts.<sup>216</sup> Equitable mootness further pares the amount of appellate precedent by dismissing potentially precedent-making appeals without determinations on the merits.<sup>217</sup>

Nonetheless, judges often find that the facilitation of reorganization trumps the appellants' rights on the merits.<sup>218</sup> On the one hand, weighing the prejudice wrought by reversal of a complex settlement as part of the equitable mootness inquiry will lead to more reorganizations. Certainly, settlements and reorganizations are favored generally in the bankruptcy context.<sup>219</sup> On the other hand, if parties believe they have limited rights to appeal, they may decide to exit the distressed debt space entirely rather than risk being left without appellate rights.<sup>220</sup> Moreover, the possibility of equitable mootness alters parties' leverage on appeal by limiting the ability to threaten to appeal. Congress has not prescribed how to balance these interests even though it clearly knows how to protect parties from appellate reversal. It has done exactly that in two separate places in the Bankruptcy Code, sections 363(m) and 364(e). Allowing a judge to balance these concerns as part of a potential dismissal of an appeal without even considering the merits effectively lets the judge substitute

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<sup>212</sup> See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson, 390 U.S. 414, 435 (1968) (“[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it.”).

<sup>213</sup> See *In re Cont'l Airlines*, 91 F.3d 553, 567–68 (3d Cir. 1996) (Alito, J., dissenting) (emphasizing the tension between the district court's decision to dismiss the appeal as equitably moot while also noting that the appellants were likely to win on the merits of their appeal).

<sup>214</sup> See McKenzie, *supra* note 21, at 783 (explaining that “almost no bankruptcy litigation goes farther than the bankruptcy court”).

<sup>215</sup> See *id.* at 783–84, 787–89.

<sup>216</sup> There is no consensus on this issue. No definitive case law exists and in a survey, just over half of bankruptcy judges felt bound by district court precedent from their district. See George W. Kuney, *Where We Are and Where We Think We Are: An Empirical Examination of Bankruptcy Precedent*, 28 CAL. BANKR. J. 71, 84 (2005) (discussing whether or not bankruptcy judges in a poll felt bound by the decisions of their circuit's district courts).

<sup>217</sup> See Bank of N.Y. Tr. Co. v. Official Unsecured Creditors' Comm. (*In re Pac. Lumber Co.*), 584 F.3d 229, 244 (5th Cir. 2009) (asserting that complex cramdown issues “cry out” for appellate review); Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627–28 (2002) (noting the lack of circuit-level bankruptcy precedent).

<sup>218</sup> See *In re Cont'l Airlines*, 91 F.3d at 571 (Alito, J., dissenting) (noting that equitable mootness reflects a tension between the imperative of an appellate court to adjudicate the merits of an appeal and adherence to a policy that promotes “facilitation of reorganizations and the protection of those who reasonably rely on reorganization plans”).

<sup>219</sup> See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry Inc. v. Anderson, 390 U.S. 414, 424 (1968).

<sup>220</sup> See *In re Pac. Lumber Co.*, 584 F.3d at 244 & n.19.

him or herself for Congress. This is exactly the concern supporting the Supreme Court's retreat from other prudential justiciability doctrines.<sup>221</sup> Returning to the relationship between the limited nature of bankruptcy jurisdiction and the duty to fully exercise it, courts cannot use prudence as a basis to extend bankruptcy jurisdiction to facilitate a particular plan because it is in the public's interest.<sup>222</sup> How can they accomplish the same result by cutting off an appeal without hearing the merits? They can't.

### A. Constitutional Concerns

Although little unites the Supreme Court's jurisprudence concerning the separation of powers, one tie is the necessity of Article III supervision and review of bankruptcy judges' final determinations of private rights.<sup>223</sup> Equitable mootness broadly eliminates Article III supervision because parties lose the right to appeal to an Article III judge, regardless of the taxonomy (public, private or otherwise) of the rights at issue.<sup>224</sup> Only recently have cases analyzed the constitutionality of this issue and their treatment has been brief.<sup>225</sup> This article delves deeper and concludes that equitable mootness is unconstitutional because it disregards the appellate rights historically provided in bankruptcy matters at common law and under the 1800 Bankruptcy Act.<sup>226</sup>

Although bankruptcy judges are authorized by statute to enter final judgments on certain claims, their status as non-Article III judges further circumscribes this authority.<sup>227</sup> Ever since Congress attempted to expand the authority of bankruptcy

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<sup>221</sup> See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) ("We do not ask whether in our judgment Congress *should* have authorized Static Control's suit, but whether Congress in fact did so.").

<sup>222</sup> *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228–29 (3d Cir. 2004) (citing *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l., Inc.)*, 372 F.3d 154, 161 (3d Cir. 2004)).

<sup>223</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944–45 (2015) (discussing the importance of Article III supervision); *Stern v. Marshall*, 564 U.S. 462, 482–83 (2011) (discussing constitutional principles of Article III adjudication and separation of powers); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

<sup>224</sup> See *Ochadlew v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 811–12 (6th Cir. 2016) (Moore, J., dissenting); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 443–46 (3d Cir. 2015) (Krause, J., concurring); *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 185, 192 (3d Cir. 2001) (Alito, J., concurring).

<sup>225</sup> See *Ochadlew*, 838 F.3d at 811–12 (Moore, J., dissenting); *In re Tribune Media Co.*, 799 F.3d 272, 285–86 (3d Cir. 2015) (discussing, but rejecting the concern that equitable mootness "insulates the judgments of Article I bankruptcy judges' from review by an Article III tribunal" and thus violates personal constitutional rights); *In re One2One*, 805 F.3d at 443–46 (Krause, J., concurring) (asserting that Congressional intent for the creation of bankruptcy courts was to "authorize [those courts] to abstain from hearing state law claims in certain circumstances—not to allow district courts to abdicate their appellate jurisdiction").

<sup>226</sup> Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 ("An act to establish an uniform System of Bankruptcy throughout the United States").

<sup>227</sup> See *Sher v. JP Morgan Chase Funding, Inc. (In re TMST, Inc.)*, Nos. 09–17787 (NVA), 11–00340(NVA), 2015 WL 4080077, at \*4 (D. Md. July 6, 2015) (discussing that claims must be both statutorily and constitutionally core for a bankruptcy court to possess final adjudicatory authority).

judges to enter final judgments by enacting the Bankruptcy Reform Act of 1978 (the “Reform Act”),<sup>228</sup> it has been unable to balance its statutory grant of final adjudicatory authority to Article I bankruptcy courts with the demands of Article III of the Constitution. Twice has the Supreme Court rejected statutes granting bankruptcy judges authority to enter final judgments when adjudicating traditional private rights.<sup>229</sup> The constitutional issue posed by equitable mootness is a different side of the same coin. It concerns the elimination of Article III appellate review of an Article I tribunal’s final judgment rather than the authority of Article I judges to enter an initial final judgment.

Even when the Supreme Court outlined a test for determining whether actions can be finally determined by bankruptcy judges,<sup>230</sup> it has failed to confirm the source of this authority.<sup>231</sup> As a result, lower courts and academics have fashioned theories to flesh out the Supreme Court’s test. The three most popular theories are the appellate review theory, the public rights theory, and the historical theory. This Article draws from the pools of ink spilled reviewing these three theories and recent Supreme Court jurisprudence to evaluate each theory and apply them to equitable mootness.

For years, courts and commentators have grappled with litigants’ right to appellate review from a final determination by a non-Article III court.<sup>232</sup> Many have suggested “sufficiently searching [appellate] review” is required to allow initial

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<sup>228</sup> Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. (2012), in scattered sections of 28 U.S.C. (2012), and in scattered sections of other titles of U.S.C. (2012)).

<sup>229</sup> See *Stern v. Marshall*, 564 U.S. 462, 469 (2011) (discussing the fact that while bankruptcy court has statutory authority to enter final judgment, it does not have constitutional authority); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding that the “broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. §1471 is unconstitutional”). The Supreme Court has subsequently narrowed the effect of these opinions by allowing litigant consent and forfeiture to grant a bankruptcy judge adjudicatory authority it would otherwise find unconstitutional under Article III. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015) (holding that “Article III permits bankruptcy courts to decide *Stern* claims submitted to them by consent”).

<sup>230</sup> Although the Supreme Court stated that “the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process,” it failed to cite to any source of authority in establishing this test. *Stern*, 564 U.S. at 499.

<sup>231</sup> See Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Litigant Consent*, 33 EMORY BANKR. DEV. J. 11, 39 (2016) (explaining that a majority of the Court has “never agreed on a constitutional theory that would validate final-judgment adjudications by non-Article III bankruptcy judges without consent of the litigants” (emphasis removed)).

<sup>232</sup> See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918, 924–26 (1988) (discussing the theory that “adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of Article III”); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 992–95 (2011) (distinguishing various contrasting court opinions on this issue); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 605–13 (2007) (providing a general overview of modern commentary on this issue); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 767 (1986) (discussing the Supreme Court’s “increasingly broad exceptions to the Constitution’s requirement that federal judicial cases be tried by an equal and independent federal judicial branch of government”).

non-Article III adjudication.<sup>233</sup> Originating from statements in the Supreme Court's opinion in *Crowell v. Benson*,<sup>234</sup> adherents to this "appellate review theory" rely upon Article III appellate review as both a necessary and sufficient basis to allow an Article I court to make a final adjudication. Although there is no agreed-upon definition for the level of appellate review required, Article III *de novo* review of questions of law is the minimum suggested standard.<sup>235</sup> Of course, equitable mootness precludes any appellate review on the merits, let alone *de novo* review.<sup>236</sup> Although equitable mootness fails the appellate review model, the impact of this conclusion is merely academic because, as will subsequently be explained, the appellate review theory does not explain the constitutional authority of bankruptcy judges.

The Supreme Court has suggested but not confirmed two other possibilities for why bankruptcy judges can issue final judgments without being Article III judges: (i) they have the same authority as bankruptcy commissioners at common law who could issue certain final judgments or (ii) certain bankruptcy matters are public rights that do not require Article III supervision at all.<sup>237</sup> On the one hand, if the historical view of bankruptcy judges' authority bounds the right to appeal from their judgments, then the same appellate rights that attached to a commissioner's final judgment currently attach to a modern bankruptcy judge's final judgment. On the other hand, if the public rights theory governs, appellate review is not necessary at all because no Article III intervention is required.

The Supreme Court's jurisprudence strongly supports the historical perspective. The Court has failed to confirm the public rights doctrine as the font for bankruptcy judges' ability to enter final judgments despite multiple opportunities.<sup>238</sup> In stark contrast, the Supreme Court has often embraced bankruptcy judges' historical roots as the foundation for its separation of powers teachings.<sup>239</sup> Based on these teachings, bankruptcy judges' authority to enter final judgments maps onto the jurisdiction of

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<sup>233</sup> See, e.g., McKenzie, *supra* note 21, at 771; Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 267–68 (1990) (arguing for Article III review to "control the legality and constitutionality of the powers asserted and exercised [by the Article I court in the first instance]").

<sup>234</sup> 285 U.S. 22 (1932).

<sup>235</sup> See Fallon, Jr., *supra* 232, at 983 n.367 (discussing a reviewing court's deference to the lower courts decision, while focusing on a "reasonable basis in law" standard).

<sup>236</sup> See *Samson Energy Res. Co. v. Semcrude L.P. (In re Semcrude, L.P.)*, 728 F.3d 314, 324–25 (3d Cir. 2013) (discussing the consequences of a successful appeal that are often "more appropriately dealt with by fashioning limited relief at the remedial stage than by refusing to hear the merits . . . at its outset").

<sup>237</sup> See *infra* Section VI.C and VI.D.

<sup>238</sup> See *Stern v. Marshall*, 564 U.S. 462, 492 n.7 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 n.11 (1989).

<sup>239</sup> See *Stern*, 564 U.S. at 484; *Granfinanciera*, 492 U.S. at 56–57; *N. Pipeline Constr. Co v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring); *Schoenthal v. Irving Tr. Co.*, 287 U.S. 92, 94–95 (1932). For scholarly articles discussing the Supreme Court's reliance on history in the context of bankruptcy, see Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261 (1999), and Robert W. Miller, *Everything Old is New Again: Why the In rem Summary Jurisdiction of the 1898 Bankruptcy Act Still Limits the Constitutional Authority of Bankruptcy Judges*, 89 AM. BANKR. L.J. 1, 8–17 (2015).

bankruptcy commissioners at common law and under the 1800 Bankruptcy Act.<sup>240</sup> The appellate jurisdiction of courts of the Chancellor at common law and the district court under the 1800 Bankruptcy Act is similarly concomitant to the appellate jurisdiction of district courts.<sup>241</sup> Just as litigants in bankruptcy court today have the same right to a final adjudication by an Article III judge as common law litigants had from the court of equity or law, they have the same right to appellate review. Equitable mootness limits this right to an appeal in a way that was not recognized at common law or under the 1800 Bankruptcy Act. Just like the bankruptcy court final adjudication of the claims in *Stern* and *Marathon*, equitable mootness is similarly unconstitutional.

This section will briefly recap the issues presented by bankruptcy judges' lack of Article III status. It will then summarize the preeminent theories regarding Article I adjudications and Article III appellate review: appellate review theory, public rights, and historic rights. It will explain why historic rights establish the right of appeal from a bankruptcy judge's final judgement and then finally describe how equitable mootness violates these historic rights.

#### i. Bankruptcy Judges and Article III

Congress may establish courts under both Article III and Article I of the Constitution,<sup>242</sup> however, the constitutional authority and required attributes of Article III and Article I courts differ. The distinctions between Article III courts and Article I courts reflect the separation of powers among the three branches of government. The greater protection provided by their independence and their commensurately greater constitutional authority distinguish Article III courts from their Article I counterparts.<sup>243</sup>

Issuing a final judgment in a federal case at law, equity, or admiralty applies Article III judicial power—authority reserved for an Article III judge by Article III, section 2 of the Constitution.<sup>244</sup> Congress cannot grant authority to enter such final judgments to a non-Article III court.<sup>245</sup> In other words, “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’”<sup>246</sup> This is the heart of judicial power and must be exercised by an Article III judge.<sup>247</sup>

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<sup>240</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, J., dissenting); *id.* at 1965 (Thomas, J., dissenting); Brubaker, *supra* note 231, at 48.

<sup>241</sup> See *Wellness Int'l*, 135 S. Ct. at 1940, 1946, 1957–58 (Roberts, J., dissenting).

<sup>242</sup> See *Palmore v. United States*, 411 U.S. 389, 406–407 (1973).

<sup>243</sup> See *Stern*, 564 U.S. at 482–84 (“Article III is an inseparable element of the constitutional system of checks and balances that both defines the power and protects the independence of the Judicial Branch.”) (internal citations and quotations omitted).

<sup>244</sup> *Id.* at 482–83, 488 (defining the power and how it protects the independence of the Judicial Branch).

<sup>245</sup> *Id.* at 484.

<sup>246</sup> *Id.* (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)).

<sup>247</sup> See *In re Todd Shipyards Corp.*, 92 B.R. 600, 604 (Bankr. D.N.J. 1988) (citing *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69–70 (1982)).

Playing its part in the separation of powers among the three governmental branches, Article III of the Constitution insulates judges appointed to the Supreme Court and the inferior courts created by Congress from political pressures by the other branches.<sup>248</sup> Article III, section 1, "establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation."<sup>249</sup> These protections have come to mean that Article III judges may only be removed through impeachment by the senate and that their compensation is irreducible.<sup>250</sup> In contrast, Article I judges' benefits and protections are not enshrined in the Constitution; they are a matter of legislative grace.<sup>251</sup> Absent the requirement that judicial power be exercised by Article III judges, the separation of powers would be illusory. Congress could simply vest all judicial power in the Article I courts and pressure them through manipulation of their pay or retention.<sup>252</sup>

The Supreme Court has famously rejected Congressional attempts to allow bankruptcy judges to adjudicate private rights in *Stern v. Marshall* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* The genesis of these cases is the distinction between Article III district court judges and their Article I bankruptcy judge counterparts. Although a bankruptcy court is a unit of the district court,<sup>253</sup> a bankruptcy judge is an Article I judge, not an Article III judge.<sup>254</sup> Because Congress established bankruptcy courts pursuant to its Article I powers, they can be (and are) staffed with bankruptcy judges who do not receive the same benefits of life tenure and salary protection afforded to Article III judges.<sup>255</sup> As Justice Rehnquist asserted in *Marathon* and Justice Roberts confirmed in *Stern*, Article I bankruptcy judges cannot exercise the judicial power of the United States by making final determinations of private rights, which are actions that are "the stuff of the traditional actions at common law tried by the courts of Westminster in 1789."<sup>256</sup> If it were only that simple. The Supreme Court's jurisprudence concerning the role of non-Article III courts in general, and bankruptcy courts in particular, parallels the mythical

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<sup>248</sup> *N. Pipeline*, 458 U.S. at 59; see also *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc) ("A separate and independent judiciary, and the guarantees that assure it, are present constitutional necessities, not relics of antique ideas.").

<sup>249</sup> *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 582 (1985); see also U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

<sup>250</sup> *N. Pipeline*, 458 U.S. at 59.

<sup>251</sup> See *Stern*, 564 U.S. at 484, 494; Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional*, 5 FLA. TAX REV. 357, 360 (2001).

<sup>252</sup> See *Stern*, 564 U.S. at 484.

<sup>253</sup> 28 U.S.C. § 151 (2012).

<sup>254</sup> See *N. Pipeline*, 458 U.S. at 60–61.

<sup>255</sup> Bankruptcy judges under the Reform Act and BAFJA serve 14-year terms, can be removed for misconduct, neglect of duty or physical/mental disability by the judicial council of the circuit in which the judge's official duty station is located and their salaries could be reduced by Congress. *Id.* at 61; *Stern*, 564 U.S. at 514–15 (Breyer, J., dissenting).

<sup>256</sup> *Stern*, 564 U.S. at 484 (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring)).

hydra; in answering one question, three others immediately appear.<sup>257</sup> The analysis of the constitutionality of equitable mootness exacerbates this uncertainty by moving beyond the muddled waters of bankruptcy courts' initial ability to enter final judgments into the truly uncharted depths of the appellate rights stemming from a bankruptcy court final judgment.

## ii. Appellate Review Theory

Until recently, the constitutional issues arising from bankruptcy judges' Article I status were cabined to the entry of final judgments, rather than appellate review. Circuit judges (albeit in dissents and concurrences) have questioned the constitutionality of equitable mootness due to its elimination of appellate review of the bankruptcy judge's final order. In support of their criticisms, these judges have relied upon the appellate review theory.<sup>258</sup>

"The core claim of [appellate review theory] is that sufficiently searching review of a legislative court's or administrative agency's decisions by a constitutional court will always satisfy the requirements of article III."<sup>259</sup> The genesis of this theory is *Crowell v. Benson*.<sup>260</sup> In *Crowell*, a government agency adjudicated a workers' compensation claim even though the claim would have been a private right subject to federal admiralty jurisdiction.<sup>261</sup> The Court held that Congress could constitutionally vest the agency with the authority to adjudicate factual questions inherent in the compensation claim, given that Article III courts retained "complete authority to insure the proper application of the law" —i.e. appellate review.<sup>262</sup> In other words, "the presence of appellate review by an Art. III court will go a long way toward ensuring a proper separation of powers."<sup>263</sup> The *Crowell* majority characterized the scope of "the judicial power of the United States," as a question of ultimate judicial control rather than initial adjudication.<sup>264</sup> In essence, "[t]he

<sup>257</sup> See, e.g., Tyson A. Crist, *Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 Am. Bankr. L.J. 627, 671–79 (2012); Miller, *supra* note 239, at 1 (2015) (profiling some of the many issues created by *Stern*).

<sup>258</sup> See, e.g., Ochadlous v. City of Detroit (*In re City of Detroit*), 838 F.3d 792, 811–12 (6th Cir. 2016) (Moore, J., dissenting); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 444 & n.10 (3d Cir. 2015) (Krause, J., concurring).

<sup>259</sup> Fallon, Jr., *supra* note 232, at 933.

<sup>260</sup> 285 U.S. 22 (1932).

<sup>261</sup> *Id.* at 39.

<sup>262</sup> *Id.* at 54. The appellate review theory arose from concern that petty administrative functions would swamp Article III courts' dockets. Merrill, *supra* note 232, at 990 (describing the federal judiciary's reluctance to be dragged into administrative adjudications).

<sup>263</sup> *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 115 (1982) (White, J., dissenting) (stating that this is suggested in *Crowell*).

<sup>264</sup> McKenzie, *supra* 21, at 772; Bator, *supra* note 233, at 267. As Professor McKenzie explained, from a pragmatic perspective, Article III courts do not have a "realistic ability to review and control the functions" of bankruptcy courts. McKenzie, *supra* note 21, at 772. The reasons for the lack of true control are numerous including the lack of appeals in bankruptcy cases, the limited precedential value of first level bankruptcy appeals, and even equitable mootness. *Id.* at 277–92. Although Professor McKenzie recognizes pragmatic shortcomings, the Supreme Court's jurisprudence regarding bankruptcy cases remains rooted in formalism and history.



available appellate review by article III courts offer[s] sufficient protection for article III values.”<sup>265</sup> In their opinions in *City of Detroit* and *One2One Communications, Inc.*, Judges Moore and Krause respectively, cited the appellate review theory in support of their respective criticisms of equitable mootness.<sup>266</sup> Neither deeply analyzed the theory. This limited treatment may have been intentional. The Supreme Court’s bankruptcy precedents embarrass the appellate review model.<sup>267</sup>

Appellate review has been central to the constitutionality of bankruptcy court adjudications,<sup>268</sup> just not in the way the appellate review theory posits. Starting in *Northern Pipeline*, the Supreme Court stressed the importance of *de novo* adjudications of private rights by bankruptcy courts.<sup>269</sup> It contrasted the *de novo* review of magistrate judges upheld by *United States v. Raddatz*,<sup>270</sup> with the deferential appellate review of bankruptcy judges’ final judgments under the Reform Act.<sup>271</sup> The Court reiterated this point in *Stern* when criticizing the deferential appellate review of bankruptcy judges’ final judgments of *Stern* claims under BAFJA.<sup>272</sup> Even more recently, in *Executive Benefits Insurance Agency v. Arkison*, the Court echoed *Raddatz* when it held that the presence of *de novo* review (not to be confused with appellate review) by a district court eliminated constitutional concerns posed by the bankruptcy judge’s initial adjudication of a *Stern* claim.<sup>273</sup>

*Northern Pipeline* and *Stern* say little about non-private rights, the type of rights usually affected by equitable mootness. With the notable exception of third party releases,<sup>274</sup> the adjudications subject to equitable mootness are usually not private

<sup>265</sup> Fallon, *supra* note 232, at 991.

<sup>266</sup> *Ochadlus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 811–12 (6th Cir. 2016) (Moore, J., dissenting); *In re One2One Commc’ns, LLC*, 805 F.3d 428, 444 & n.10 (3d Cir. 2015) (Krause, J., concurring).

<sup>267</sup> Compare *supra* notes 258–260 and accompanying text with Fallon, *supra* note 259, at 991 (asserting that *Northern Pipeline* was incorrectly decided because the Article III review was sufficient to allow bankruptcy court adjudication of private rights).

<sup>268</sup> See *Ochadlus*, 838 F.3d at 811 (Moore, J., dissenting).

<sup>269</sup> *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 78–79, 82 n.33 (1982).

<sup>270</sup> 447 U.S. 664, 683–84 (1980).

<sup>271</sup> *N. Pipeline*, 458 U.S. at 82–83.

<sup>272</sup> *Stern v. Marshall*, 564 U.S. 462, 487 (2011); see also *In re One2One Commc’ns, LLC*, 805 F.3d 428, 433 (3d Cir. 2015) (“[T]he Court in *Stern* made clear that non-Article III bankruptcy judges do not have the constitutional authority to adjudicate a claim that is exclusively based upon a legal right grounded in state law despite appellate review of the bankruptcy judge’s decision by an Article III judge.”).

<sup>273</sup> *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014). In the same vein, the majority in *Wellness* confirmed litigants’ ability to consent to the final determination of *Stern* claims by a bankruptcy judge, in part, because “Article III courts retain supervisory authority over the process.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944–45 (2015).

<sup>274</sup> See *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 242 F.3d 322, 339–40 (D. Del. 2017) (explaining that third-party releases are equivalent to adjudications on the merits, including when private rights are released). *Contra In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 273, 277–78, 282, 291, 294, 296 (Bankr. D. Del. 2017) (finding that third party releases can be finally determined by a bankruptcy judge for a number of reasons including that they are federal claims, they are necessarily resolved as part of claims allowance process, and they stem from the bankruptcy itself as part of confirmation); *In re Charles St. African Methodist Episcopal Church*, 499 B.R. 66, 99 (Bankr. D. Mass. 2013) (asserting that third-party releases granted as part of

rights—the type of rights at issue in *Northern Pipeline* and *Stern*—and they are not subject to *de novo* review—the standard of review in *Executive Benefits* and *Raddatz*.<sup>275</sup>

Taken together, *Northern Pipeline* and *Stern* teach that appellate review is not sufficient to allow a bankruptcy judge to issue a final judgment on a private right without litigant consent. This conclusion undermines the appellate review theory's core premise and its explanatory power. Shorn of its central proposition, the appellate review theory's apparent promise as the key to unlock equitable mootness is only imagined.

### iii. Public Rights Theory

The public rights exception is a more popular explanation for bankruptcy courts' ability to enter final judgements.<sup>276</sup> Adherents argue that Congress established specific bankruptcy matters pursuant to the Code that only exist by Congress' will and benefit the public collectively.<sup>277</sup> As a result, Congress can set any level of appellate review by an Article III judge, including none at all.<sup>278</sup> In the context of equitable mootness, if confirmation and the approval of transactions are public rights, then a loss of appellate review does not pose any constitutional concerns; it is unnecessary.<sup>279</sup>

Commentators continue to debate the origins of the public rights exception but the most popular views derive the doctrine from the federal government's sovereign immunity and the distinction between individual (private) rights and collective (public) rights.<sup>280</sup> When the federal government is a defendant, the default result is dismissal of the action based on the sovereign immunity of the federal government.<sup>281</sup> The action will only proceed to the merits if the federal government waives its sovereign immunity.<sup>282</sup> Allowing Congress to select the adjudicator over

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confirmation of a plan of reorganization are public rights even if the underlying claims released are private rights).

<sup>275</sup> *Wellness Int'l*, 135 S. Ct. at 1939, 1958 (“No one here challenges the constitutionality of magistrate judges or disputes that they, like bankruptcy judges, may issue reports and recommendations that are reviewed *de novo* by Article III judges.”) (Roberts, C.J., dissenting); *United States v. Raddatz*, 447 U.S. 664, 674, 676, 682 (1980).

<sup>276</sup> See, e.g., *In re Linear Elec. Co.*, 852 F.3d 313, 319–20 (3d Cir. 2017); *Scott v. Am. Sec. Ins. Co.* (*In re Scott*), 572 B.R. 492, 518 (Bankr. S.D.N.Y. 2017); *West v. Freedom Med., Inc.* (*In re Apex Long Term Acute Care-Katy, L.P.*), 465 B.R. 452, 458–60 (Bankr. S.D. Tex. 2011); David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 452 (1983).

<sup>277</sup> See *supra* notes 270–273 and accompanying text (discussing Congress' power to create tribunals).

<sup>278</sup> See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 632 (1984).

<sup>279</sup> See *In re Charles St. Church*, 499 B.R. at 99.

<sup>280</sup> See, e.g., *Atlas Roofing Co. v. OSHA Review Comm'n*, 430 U.S. 442, 455 n.13 (1977); *Loveridge v. Hall* (*In re Renewable Energy Dev. Corp.*), 792 F.3d 1274, 1278–79 (10th Cir. 2015).

<sup>281</sup> See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 67–68 (1989) (Scalia, J., concurring in part).

<sup>282</sup> *Id.* at 68. Unlike the states' Eleventh Amendment sovereign immunity, federal sovereign immunity cannot be impliedly waived. See *Bilger v. United States*, No. CIV F 00–6486 OWWJLO, 2001 WL 169568, at \*4 (E.D. Cal. Jan. 10, 2001).

such an action does not create separation of powers concerns because the very existence of the action is contingent upon Congressional grace.<sup>283</sup> Another possible genesis of the public rights exception is that life, liberty and property “belong to individuals inalienably” and can only be taken by an order issued by an Article III judge.<sup>284</sup> In contrast, “additional legal interests may be generated by positive law and belong to the people as a civic community and disputes about their scope and application may be resolved through other means, including legislation or executive decision.”<sup>285</sup> Irrespective of its origins, the initial interpretation of the public rights exception was narrow—it only encompassed actions where the federal government was a party,<sup>286</sup> including agency adjudications.<sup>287</sup>

Bankruptcy is usually a contest between private parties, and even when the government is a creditor, it competes on the same playing field as other similarly situated creditors.<sup>288</sup> It does not naturally fit within the public rights exception. *Northern Pipeline* confirmed this conclusion as “a matter of public rights must at a minimum arise ‘between the government and others.’”<sup>289</sup> Yet, later in the opinion, the Court appeared to reconsider this definitive statement and left open the possibility that the restructuring of debtor-creditor relations is a public right (presumably, even when only private parties are involved).<sup>290</sup>

In enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”),<sup>291</sup> Congress attempted to categorize some bankruptcy matters—core proceedings—as public rights.<sup>292</sup> The link between core claims and public rights is a syllogism based upon language found in the *Northern Pipeline* plurality opinion. Recall, the restructuring of debtor-creditor relations “may well be a public right.”<sup>293</sup> The Court also categorized it as the “core of the federal bankruptcy power.”<sup>294</sup> Based on this language, Congress tried to establish fundamental bankruptcy matters—core proceedings—and signal that they are public rights. Section 157(b)(2) of Title 28 of the U.S. Code provides a non-exhaustive list of core proceedings, including many

<sup>283</sup> *Stern v. Marshall*, 564 U.S. 462, 488–89 (2011); *Granfinanciera*, 492 U.S. at 52; *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–54 (1986).

<sup>284</sup> *Loveridge*, 792 F.3d at 1278; see also *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting).

<sup>285</sup> *Loveridge*, 792 F.3d at 1278.

<sup>286</sup> See *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (noting that the presence of the United States as a party was necessary but not sufficient for an action to be a public right).

<sup>287</sup> See, e.g., *Atlas Roofing Co. v. OSHA Review Comm’n*, 430 U.S. 442, 450 n.7 (1977); *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932).

<sup>288</sup> *Currie*, *supra* note 276, at 452; see also *Gardner v. New Jersey*, 329 U.S. 565, 571–74 (1947) (holding that the filing of a proof of claim constitutes a waiver of sovereign immunity putting the federal government on the same footing as other litigants), *superseded by statute*, An Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95–598, Title I, § 101, 92 Stat. 2549 (1978).

<sup>289</sup> *N. Pipeline*, 458 U.S. at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929)).

<sup>290</sup> See *id.* at 71.

<sup>291</sup> Pub. L. No. 98–353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

<sup>292</sup> See *In re Rheuban*, 128 B.R. 551, 563–64 (Bankr. C.D. Cal. 1991); *Earle Indus., Inc. v. Bond Gen. Contracting, Inc. (In re Earle Indus., Inc.)*, 71 B.R. 919, 921 n.4, 924–25 (Bankr. E.D. Pa. 1987).

<sup>293</sup> *N. Pipeline*, 458 U.S. at 71.

<sup>294</sup> *Id.* at 71.

bedrock bankruptcy matters such as the claims allowance process, determinations of discharge, and turnover of property.<sup>295</sup> Core proceedings are reviewable under usual appellate rules,<sup>296</sup> not the *de novo* review required by *Northern Pipeline* for private rights.<sup>297</sup> Consequently, they must fit within an exception to Article III to allow their final determination by a bankruptcy judge.<sup>298</sup> In contrast, if a matter is only “related to” the bankruptcy case, it is a non-core claim. The matter is subject to *de novo* review on appeal, following a report and recommendation issued by a bankruptcy judge.<sup>299</sup>

Shortly following the enactment of BAFJA, a pair of Supreme Court opinions provided further support for categorizing core proceedings were public rights. In *Thomas v. Union Carbide Agricultural Products Co.*, the Court shifted from the course plotted by its opinion in *Northern Pipeline* and expanded the public rights exception to a cause of action between two private parties created by a federal statute.<sup>300</sup> Building on *Thomas*, the majority in *Commodities Futures Trading Commission v. Schor*, made the next natural expansion of the public rights doctrine: a common law action between two parties incorporated into a regulatory framework.<sup>301</sup> Following *Thomas* and *Schor*, many courts believed that core proceedings under BAFJA were public rights.<sup>302</sup>

The Supreme Court reversed course again in its opinions in *Granfinanciera S.A. v. Nordberg* and *Stern v. Marshall* by embracing a historical formalism echoing *Northern Pipeline*. In both cases, the Court held that even though certain actions are core proceedings, this Congressional delineation does not make them public rights.<sup>303</sup> Notwithstanding Congress’ classification of fraudulent transfers as public

<sup>295</sup> 28 U.S.C. § 157(b) (2012).

<sup>296</sup> *Stern v. Marshall*, 564 U.S. 462, 474–75 (2011).

<sup>297</sup> See *N. Pipeline*, 458 U.S. at 71–72, 79.

<sup>298</sup> *C.f. Brubaker*, *supra* note 231, at 39 (2016) (explaining that the Supreme Court has yet to uphold a final judgment by a bankruptcy judge without litigant consent as a recognized exception to Article III adjudication).

<sup>299</sup> 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033; see also *Chi. Bank of Commerce v. Amalgamated Tr. & Sav. Bank (In re Mem’l Estates, Inc.)*, 90 B.R. 886, 894 (Bankr. N.D. Ill. 1988).

<sup>300</sup> *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 588–90 (1985).

<sup>301</sup> *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844, 852–55 (1986); see also *Stern*, 564 U.S. at 491–92 (analyzing the *Schor* decision).

<sup>302</sup> See, e.g., *Associated Grocers of Neb. Coop., Inc. v. Am. Home Prods. Corp. (In re Associated Grocers of Neb. Coop., Inc.)*, 62 B.R. 439, 445 (D. Neb. 1986); *England v. Fortune Sys. Corp. (In re Visidata Corp.)*, 84 B.R. 673, 680 (Bankr. N.D. Cal. 1988).

<sup>303</sup> See *Stern v. Marshall*, 564 U.S. 462, 487, 493 (2011); *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). In *Granfinanciera*, the Chapter 11 Trustee’s fraudulent transfer claim was brought against a non-creditor who demanded a jury trial under the Seventh Amendment to the Constitution. As core proceedings, fraudulent transfers not only can be finally determined by a bankruptcy judge but no Seventh Amendment right to a jury trial exists. However, “the right to a jury trial is narrower than the right to Article III adjudication because the right to a jury trial does not attach to a core equitable action, but a core equitable action will still require Article III adjudication if it does not satisfy either prong of the *Stern* test.” Robert Miller, *Fleshing Out the Skeleton: Defining the Prongs of Stern v. Marshall*, 11 DEPAUL BUS. & COM. L.J. 1, 17, 19 (2012). Even though they are not exactly the same inquiry, if a matter is a public right, it can be adjudicated by a non-article III judge and the Seventh Amendment jury trial right need not attach. G. Ray Warner, *Rotten to the “Core”: An Essay on Juries, Jurisdiction and Granfinanciera*, 59 UMKC L. REV. 991, 1021 (1991).

rights (via their categorization as core proceedings by 28 U.S.C. § 157(b)), the *Granfinanciera* majority employed a historical analysis to examine the roots of fraudulent transfers.<sup>304</sup> Fraudulent transfers have long been cognizable outside of bankruptcy cases as a creditors' remedy. Indeed, an actual fraudulent transfer does not require insolvency, the usual precondition for a bankruptcy filing.<sup>305</sup> Due to their roots independent of bankruptcy cases and their goal of augmenting the estate when brought in a bankruptcy case, fraudulent transfers are private rights comparable to the breach of contract action in *Northern Pipeline*.<sup>306</sup> Justice Brennan, the author of the plurality opinion in *Northern Pipeline* and the majority in *Granfinanciera*, retreated from his comments in *Northern Pipeline* and not only failed to confirm that any bankruptcy matters are public rights but noted significant criticism of such classification.<sup>307</sup>

In *Stern v. Marshall*, the Supreme Court similarly failed to label a core proceeding, this time a counterclaim against a creditor, as a public right. The Court considered the proceeding not just analogous but equivalent to those in *Northern Pipeline* and *Granfinanciera*.<sup>308</sup> Although *Granfinanciera* had already clarified that classifying an action as a core proceeding was not sufficient to make the action a public right, the filing of defendant's proof of claim represented a distinction from *Northern Pipeline* and *Granfinanciera*. Previous cases had allowed bankruptcy judges to finally determine private right claims against defendants who had filed proofs of claim.<sup>309</sup> Neither of those cases, however, even mentioned the public rights exception, much less made the filing of a proof of claim sufficient to trigger it. Both rested on the private rights being determined as part of the claims allowance process.<sup>310</sup> Consistent with this precedent, the *Stern* majority explained that a bankruptcy court can finally determine an action if it "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."<sup>311</sup> No mention of the public rights doctrine there, and no confirmation anywhere in the opinion that any bankruptcy matter is a matter of public rights.<sup>312</sup> Following *Stern*,

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<sup>304</sup> *Granfinanciera*, 492 U.S. at 42–43.

<sup>305</sup> See, e.g., *Anderson v. Michaelson*, 127 F. Appx. 253, 256 (9th Cir. 2005); *Scottsdale Ins. Co. v. Tolliver*, No. 04–CV–0227–CVE–FHM, 2012 WL 1581605, at \*4 (N.D. Okla. Mar. 4, 2012); *Liberty Mut. Ins. Co. v. Hoge*, No. C 03–02502 WHA, 2005 WL 756568, at \*4 (N.D. Cal. April 1, 2005); *Miller v. Dutil (In re Total Containment, Inc.)*, No. 04–13144F, 2005 WL 6522761, at \*16 (Bankr. E.D. Pa. Oct. 18, 2005).

<sup>306</sup> *Granfinanciera*, 492 U.S. at 56.

<sup>307</sup> *Id.* at 56 n.11.

<sup>308</sup> *Stern v. Marshall*, 564 U.S. 462, 487 (2011).

<sup>309</sup> *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) (per curiam); *Katchen v. Landy*, 382 U.S. 323, 325, 340 (1966).

<sup>310</sup> See *Langenkamp*, 498 U.S. at 44–45; *Katchen*, 382 U.S. at 333–35. Indeed, *Katchen* expressly stated that it was not determining if a common law cause of action could be decided absent the claims allowance process. *Id.* at 332–33 n.9 ("As this is the basis of our decision, we obviously intimate no opinion concerning whether the referee has summary jurisdiction to adjudicate a demand by the trustee for affirmative relief, all of the substantial factual and legal bases for which have not been disposed of in passing on objections to the claim.").

<sup>311</sup> *Stern*, 564 U.S. at 499.

<sup>312</sup> See *id.* at 492 n.7.

core proceedings that could not be finally determined by bankruptcy judges became known as *Stern* claims.<sup>313</sup> In spite of these repeated failures to classify bankruptcy matters as public rights,<sup>314</sup> some courts and commentators have continued to rely upon *Thomas* and *Schor* for support when characterizing various bankruptcy matters as public rights, including disputes resolved pursuant to the confirmation of plans of reorganization that could be subject to equitable mootness.<sup>315</sup>

If these courts are correct and no Article III involvement is required for the adjudication of public rights, the lack of Article III review resulting from equitable mootness is immaterial. “[T]he whole point of the ‘public rights’ analysis was that no judicial involvement at all was required—executive determination alone would suffice.”<sup>316</sup> Although this conclusion is seemingly obvious, the Supreme Court has not confirmed it. Instead, in *Northern Pipeline* it “suggested that [Congress] may be required to provide[] for Art. III judicial review.”<sup>317</sup> As a result, even if certain bankruptcy matters are categorized as public rights, equitable mootness still violates appellants’ constitutional rights by foreclosing Article III appellate review.<sup>318</sup>

### B. Historic Rights

The historic boundaries of bankruptcy commissioners bound modern bankruptcy judges’ ability to enter final judgments and designate the required scope of appellate review. Bankruptcy courts existed at common law and were established under federal law shortly after the Framing of the Constitution.<sup>319</sup> The authority of these courts is not simply an artifact of history. As recognized by *Northern Pipeline*, *Granfinanciera*, and *Stern*,<sup>320</sup> the authority of the bankruptcy commissioners at common has established the frontier for the constitutional authority of bankruptcy courts to enter final judgments.<sup>321</sup> Rather than rely upon the questionable public rights exception to delineate the amount of appellate review, this historical inquiry

<sup>313</sup> See *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2168 (2014).

<sup>314</sup> *Loveridge v. Hall (In re Renewable Energy Dev. Corp.)*, 792 F.3d 1274, 1282 (10th Cir. 2015) (“[D]espite suggesting some aspects of bankruptcy implicate only public rights, precisely none of the Court’s Article III bankruptcy cases has yet upheld a bankruptcy court’s decision on this basis.”).

<sup>315</sup> See, e.g., *JPMCC 2007–CIBC 19 East Greenway, LLC v. Bataa/Kierland LLC (In re Bataa/Kierland LLC)*, 496 B.R. 183, 188–189 (D. Ariz. 2013) (explaining that the bankruptcy court has authority to decide contractual dispute in the context of plan confirmation under the “public rights” exception).

<sup>316</sup> *Strauss*, *supra* note 278, at 632 (emphasis removed).

<sup>317</sup> *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.23 (1982) (citing *Atlas Roofing Co. v. OSHA Review Comm’n*, 430 U.S. 442, 455 n.13 (1977)).

<sup>318</sup> This conclusion is particularly important in the Third Circuit, where many high-profile bankruptcy appeals are brought (due to it including the District of Delaware), which has recognized claims that arise under federal bankruptcy laws as public rights. See, e.g., *In re Linear Elec. Co.*, 852 F.3d 313, 320 (3d Cir. 2017).

<sup>319</sup> See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951–52 (2015) (Roberts, C.J., dissenting).

<sup>320</sup> See *supra* note 239 and accompanying text.

<sup>321</sup> *Wellness Int’l*, 135 S. Ct. at 1970 (Thomas, J., dissenting). One of the newer members of the Supreme Court, Justice Gorsuch, has at least recognized this perspective. See *Loveridge v. Hall (In re Renewable Energy Dev. Corp.)*, 792 F.3d 1274, 1282 (10th Cir. 2015).

follows a worn path. Indeed, Justice Thomas took this path to its logical end: the appellate review provided to litigants must match that provided contemporaneously with the Framing.<sup>322</sup> At that time, determinations by bankruptcy commissioners (the predecessors to today's bankruptcy judges) were subject to appellate review by the Chancellor in England and by the district court under the 1800 Bankruptcy Act. This subpart discusses this history and its impact on the constitutionality of equitable mootness.

From *Marathon*, to *Stern*, to the dissents of Chief Justice Roberts and Thomas in *Wellness*, the historic theory of bankruptcy court authority emerges. The constitutional authority of bankruptcy judges is predicated upon the authority of English and American bankruptcy commissioners at the time of the Framing of the Constitution. In *Northern Pipeline*, Justice Rehnquist's majority-making concurrence explained that a bankruptcy judge could not adjudicate an action "for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."<sup>323</sup> This statement rephrases the famous dicta of *Murray's Lessee*: Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."<sup>324</sup> The majority in *Stern* confirmed this historical limitation was not altered by the enactment of BAFJA to replace the Reform Act.<sup>325</sup> Meanwhile, in his concurrence, Justice Scalia began fleshing out the historic limitation by linking it to the historical practices applied under the 1800 Bankruptcy Act,<sup>326</sup> which had copied the contemporary English substance and procedure.<sup>327</sup>

In *Wellness International Ltd. v. Sharif*, the dissenting opinions of Chief Justice Roberts and Justice Thomas continued the trajectory of *Marathon* and *Stern*. While the majority in *Wellness* held that litigant consent and forfeiture could be sufficient to allow a bankruptcy judge to issue final judgments on *Stern* claims,<sup>328</sup> the dissents analyzed the boundaries of *Stern* claims. Both dissents adopted the historical jurisdiction of bankruptcy commissioners at common law and under early United States bankruptcy legislation as the boundary for the constitutional authority of contemporary bankruptcy judges. According to the Chief Justice: "This historical practice, combined with Congress's constitutional authority to enact bankruptcy laws, confirms that Congress may assign to non-Article III courts adjudications involving 'the restructuring of debtor-creditor relations, which is at the core of the

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<sup>322</sup> See *Wellness Int'l*, 135 S. Ct. at 1970 (Thomas, J., dissenting).

<sup>323</sup> *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 at 90 (1982) (Rehnquist, J., concurring).

<sup>324</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

<sup>325</sup> *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

<sup>326</sup> See *Id.* at 505 (Scalia, J., concurring) (citing Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 607-609 (1998)).

<sup>327</sup> Plank, *supra* note 326, at 607-09.

<sup>328</sup> *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 n.7 (2015). The majority did not analyze whether the relevant claim was a *Stern* claim or provide any guidance for making such a determination. See *id.*

federal bankruptcy power.”<sup>329</sup> Justice Thomas echoed the Chief Justice’s analysis and extended it to its natural conclusion: as a historical exception to Article III, Congress may “establish bankruptcy courts that exercise jurisdiction akin to that of bankruptcy commissioners in England, subject to review traditionally had in England.”<sup>330</sup> This is the terminus of the route charted by *Marathon*, *Stern*, and *Murray’s Lessee*. We must survey the right to appeal the commissioners’ decisions at common law and under the 1800 Bankruptcy Act to provide a reference for comparison to modern practices.

At common law, the Lord Chancellor appointed bankruptcy commissioners<sup>331</sup> who exercised *in rem* jurisdiction over the debtor’s property.<sup>332</sup> As a precondition for distributing the liquidated proceeds of the debtor’s property, the commissioners adjudicated the validity of creditors’ claims.<sup>333</sup> The commissioners’ jurisdiction was limited to *in rem* determinations concerning property properly in the custody of the commissioner or his representative, the assignee.<sup>334</sup> This authority was not advisory; final judgments entered by the commissioners were subject to appellate review.<sup>335</sup> The commissioners’ jurisdiction did not extend to all bankruptcy matters. The assignees brought actions in the courts of law and equity to recover debts owed to the debtor or recover the debtor’s property.<sup>336</sup> The Commissioners could not adjudicate these actions because they invoked *in personam* jurisdiction by imposing liability on third parties.<sup>337</sup>

Appellate review of commissioners’ decisions was available as a right at common law. An unsatisfied bankrupt or creditor could obtain direct review of the

<sup>329</sup> *Id.* at 1951 (Roberts, C.J., dissenting) (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. at 71, 102 (1982)). The Chief Justice further relied upon the 1898 Bankruptcy Act because of its similarities to the jurisdiction of commissioners at common law. The summary jurisdiction of bankruptcy referees under the 1898 Act was predicated upon property being in *custodia legis* of the court based upon the debtor’s actual or constructive possession, just like the commissioner’s jurisdiction at common law. *See id.* at 1952–54.

<sup>330</sup> *Id.* at 1970 (Thomas, J., dissenting).

<sup>331</sup> Five commissioners were selected to conduct the proceedings and a quorum of three was necessary to determine almost all issues. Plank, *supra* note 327, at 576.

<sup>332</sup> Brubaker, *supra* note 239, at 263–64.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Clarke v. Capron* (1795) 30 Eng. Rep. 832; 2 Ves. Jun. 667. In *Clarke*, the assignees (equivalent of a modern bankruptcy trustee) appealed an allowance of a creditor’s claim after the commissioner had awarded a dividend. The award of a dividend functioned as a default judgment against the assignees. The assignees attempted to appeal by filing a bill of equity rather than petition. *Id.* at 832–33. The Chancellor refused to entertain the appeal because the use of the bill was improper. The assignees should have timely filed a petition. Due to their procedural failure, the appeal was dismissed. Although at first blush *Clarke* may appear to support equitable mootness based on the discretionary dismissal by the Chancellor, the case is properly read as requiring an appropriate mode of appeal. *See id.* at 833 (noting that timely appeal via petition should have been easily accomplished); *see also* Plank, *supra* note 327, at 595 (evaluating *Clarke*).

<sup>336</sup> Ezra H. Cohen, *The Effect of Stern v. Marshall on Avoidance Actions*, 22 NORTON J. BANKR. L. & PRAC. (2013).

<sup>337</sup> *See* Brubaker, *supra* note 239, at 263–64; *See* John C. McCoid, II, *Right to Jury Trial in Bankruptcy*: *Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 30–31 (1991).



commissioners' decision by filing a petition for review by the Lord Chancellor.<sup>338</sup> No second level right to an appeal existed for a petition.<sup>339</sup> If the matter was particularly difficult, a bill in equity or an action at law could be brought to collaterally attack the commissioners' decision prior to a dividend being declared for creditors.<sup>340</sup> Not only would such a strategy allow a more formal mode of adjudication, it would also preserve a right to appeal the Chancellor's decision.<sup>341</sup> Regardless of the chosen mode of appeal, the direct authority of the Chancellor over the commissioners warranted a right to appeal.<sup>342</sup> "An appeal lies to [the Chancellor] from all [the commissioners'] decisions, and all their proceedings are subject to his revision."<sup>343</sup>

The first Federal bankruptcy statute, the Bankruptcy Act of 1800,<sup>344</sup> copied the contemporary English system of appeal for bankruptcy matters.<sup>345</sup> Among the many elements it retained was the initial adjudication by commissioners, however, it provided for a simpler single right of appeal to an Article III district court judge.<sup>346</sup> Just like in England, the district court judges' authority over the commissioners

<sup>338</sup> *Ex parte Bowes* (1798) 31 Eng. Rep. 86, 87, 90–91; 4 Ves. Jun. 168, 170, 176–77; see also Plank, *supra* note 326, at 576–77; *Ex parte Bryant* (1812) 35 Eng. Rep. 83, 83; 1 V & B 211, 211 (stating no second level right to an appeal existed from the decision of the Chancellor on a petition.).

<sup>339</sup> See *Ex parte Bryant*, 35 Eng. Rep. at 83; *Murphy v. Felice* (*In re Felice*), 480 B.R. 401, 420 (Bankr. D. Mass. 2012) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*821).

<sup>340</sup> *Ex parte Linthwaite* (1809) 33 Eng. Rep. 973; 16 Ves. Jun. 234; see also *In re Sand*, 21 F. Cas. 333, 335–36 (S.D.N.Y. 1822) (No. 12,302) (analyzing jurisdiction of Chancellor).

<sup>341</sup> See *Ex parte Cawkwell* (1812) 34 Eng. Rep. 505; 19 Ves. Jun. 234; *In re Sand*, 21 F. Cas. at 336. In any case, the mode of appeal did not impact the breadth or type of relief available. *Id.* ("In every case [the Chancellor] can give the same relief upon a petition as upon a bill filed"). The more formal alternatives to review by petition, however, carried some risk. If the difficulties were not sufficient or the filing was made after a dividend was declared, the bill or action might be dismissed as a waste of time and estate resources. See *Clarke v. Capron* (1795) 30 Eng. Rep. 832; 2 Ves. Jun. 667.

<sup>342</sup> *In re Sand*, 21 F. Cas. at 336.

<sup>343</sup> *Id.*

<sup>344</sup> The Bankruptcy Act of 1800 was enacted in response to the national depression of 1798. Vincent L. Leibell, Jr., *The Chandler Act—Its Effect Upon the Law of Bankruptcy*, 9 FORDHAM L. REV. 380, 382 (1940). Certainly, the most famous debtor under the act was Robert Morris, a founding father and signer of both the Constitution and the Declaration of Independence. His case provided one of the few reported opinions analyzing the 1800 Bankruptcy Act. See *In re Morris*, 17 F. Cas. 785, 786 (W.D. Pa. 1837) (No. 9,825).

<sup>345</sup> See Plank, *supra* note 327, at 573. Indeed, the 1800 Act was so similar that contemporary English bankruptcy precedents were viewed as precedential. See *Roosevelt v. Mark*, 6 Johns. Ch. 266, 285 (N.Y. Ch. 1822) ("The bankrupt act of the United States, of April, 1800, was a consolidation of the previous provisions in the English statutes of bankruptcy; and the English decisions on their statutes prior to that date, properly apply as rules of construction to this act of Congress."). 5 Geo. 2, c. 30, § 1 (1732) was the English bankruptcy statute in effect during the American Revolution, through the passage of 1800 Bankruptcy Act. Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 337 n.85 (2013).

<sup>346</sup> See *In re Morris*, 17 F. Cas. at 788; Plank, *supra* note 327, at 609. Courts disagreed over whether a further right to appeal from a district court existed. Compare *In re Sand*, 21 F. Cas. at 336, 339 (noting no right to appeal from district court review of commissioners' determination and noting existence of opinion of Justice Livingston, riding the circuit, coming to same conclusion) with *Lucas v. Morris*, 15 F. Cas. 1063, 1065 (C.C.S.D.N.Y. 1825) (No. 8,587) (stating circuit court possessed some jurisdiction to hear appeals from district court).

formed the basis for the right to appeal.<sup>347</sup> More fundamentally, if this right did not exist, one district court questioned: “Who is to recall the commission?—the authority which is thus abused, which every one[sic] must agree ought to be recalled by somebody?”<sup>348</sup>

The parallels to today’s system of bankruptcy adjudication are telling. The constitutional bounds of bankruptcy adjudication are established by the limitations on the commissioners at common law and under the 1800 Bankruptcy Act, including the associated right of appeal.<sup>349</sup> Modernly, this is the right to appeal to an Article III judge. BAFJA satisfies this historical requirement by providing Article III appellate review of bankruptcy court judgments as a matter of right.<sup>350</sup> It is initially available as a first level appeal to the district court<sup>351</sup> but further review as a matter of right is available to the Court of Appeals.<sup>352</sup> Discretionary review by the Supreme Court via a writ of certiorari is possible.<sup>353</sup>

Equitable mootness unconstitutionally abridges the right to Article III appellate review. It prevents an Article III judge from reviewing an Article I bankruptcy judge’s final determination.<sup>354</sup> Even though the Article III Judge is making the prudential decision to not hear the merits of the appeal, the right to appellate review was recognized at common law and it must be provided.<sup>355</sup> No evidence exists that the English legislature at common law or Congress, at the time of the Framing, has ever sanctioned equitable mootness. Indeed, the evidence suggests the opposite. The right to review and supersede the commissioners was necessary to uphold the bankruptcy laws.<sup>356</sup> “[I]f he has no authority to supersede his commission, the

<sup>347</sup> *In re Morris*, 17 F. Cas. at 794.

<sup>348</sup> *Id.*

<sup>349</sup> See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1970 (2015) (Thomas, J., dissenting); *In re One2One Commc’ns, LLC*, 805 F.3d 428, 446 (3d Cir. 2015) (Krause, J., concurring) (“[T]he decisions of bankruptcy commissioners, referees, and, most recently, judges have always been subject to review in courts of law or equity.”). “From the nature of preconstitutional bankruptcy adjudication emerges a general principle: The details of bankruptcy adjudication are a matter of legislative discretion requiring only a right of appeal to a court of law or equity.” Plank, *supra* note 327, at 574. Although Professor Plank employed this conclusion as evidence of the appellate review theory and a critique of the conclusions first reached in *Northern Pipeline* and later reiterated in *Stern*, it also illustrates the necessity of appellate review based on historical practice.

<sup>350</sup> See *In re Machne Menachem, Inc.*, 371 B.R. 63, 75 (Bankr. M.D. Pa. 2006) (Deciding not to apply equitable mootness to a motion for reconsideration, explaining that “[a]ppellate review by an Article III Judge is a fundamental pillar of our jurisdictional grant.”).

<sup>351</sup> The appellant can always choose to appeal to the district court rather than a bankruptcy appellate panel, even when one is available. See 28 U.S.C. § 158 (2012).

<sup>352</sup> 28 U.S.C. § 158(c)(2)(A) (2012).

<sup>353</sup> 28 U.S.C. § 1254 (2012).

<sup>354</sup> *In re One2One*, 805 F.3d at 445 (Krause, J., concurring).

<sup>355</sup> The Supreme Court has provided contrary guidance. See *id.* at 446. Indeed, equitable mootness has never been confirmed by the Supreme Court and it might be on shaky ground if it is reviewed by the current Court. Then-Judge Alito heavily criticized the doctrine when he sat on the Third Circuit. *In re Cont’l Airlines*, 91 F.3d 553, 567–73 (3d Cir. 1996) (en banc) (Alito, J., dissenting).

<sup>356</sup> *In re Morris*, 17 F. Cas. 785, 788 (W.D. Pa. 1837) (No. 9,825). When petitioned to review the determination of the commissioners, the Chancellor at common law and each district court judge under the 1800 Bankruptcy Act “takes care that the true intentions of the legislature in making the statutes, as he understands them, shall be carried into effect, and shall not be perverted.” See *id.* at 793.

mischief will go on; and I know of no remedy for it.”<sup>357</sup> If an appeal is dismissed pursuant to equitable mootness, the mischief will continue because the merits have not been adjudicated and the appellant is left without a remedy.

The constitutional concerns presented by equitable mootness are further exacerbated by the bankruptcy judge’s control over many of the factors comprising the equitable mootness inquiry.<sup>358</sup> Returning to the time of the Framing, the Chancellor’s and district court’s control over the commissioners was comprehensive.<sup>359</sup> Although it was rooted in the right to appeal, the control extended to the right to supersede the commission.<sup>360</sup> BAFJA modernly reflects this spirit of control through the district court’s authority to withdraw the reference from the bankruptcy court over any case or proceeding, and the district court’s ability to limit the bankruptcy court’s authority by order.<sup>361</sup> Indeed, these provisions were enacted in response to *Northern Pipeline* and more limited supervisory authority under the unconstitutional Reform Act.<sup>362</sup> Equitable mootness turns the tables and “effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue.”<sup>363</sup>

Although Article III judges decide whether an appeal is equitably moot, bankruptcy courts control nearly all of the variables in the equation, including whether a reorganization plan is initially approved, whether a stay of plan implementation is granted, whether settlements or releases crucial to a plan are approved and executed, whether property is transferred, whether new entities (in which third parties may invest) are formed, and whether distributions (including to third parties) under the plan begin—all before plan challengers reach an Article III court.<sup>364</sup>

This virtual role reversal with the bankruptcy court controlling the adjudication by the district court violates the separation of powers and independently supports the unconstitutionality of equitable mootness.<sup>365</sup>

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<sup>357</sup> *Id.* at 795.

<sup>358</sup> *In re One2One*, 805 F.3d at 445 (Krause, J., concurring).

<sup>359</sup> *In re Morris*, 17 F. Cas. at 794–95; *In re Sand*, 21 F. Cas. 333, 335–36 (S.D.N.Y. 1822) (No. 12,302) (“[I]n virtue of his power to appoint and to remove, to create and to annihilate these officers, [the Chancellor] possesses the authority to control and direct them in all their acts, and thus effectually to exercise the whole jurisdiction. It would be very difficult, and not necessary, to enumerate the very various instances in which his jurisdiction is said to be derived from his superintending authority over the commissioners.”).

<sup>360</sup> *In re Morris*, 17 F. Cas. at 794–95; *In re Sand*, 21 F. Cas. at 335.

<sup>361</sup> *Land-O-Sun Dairies, Inc. v. Fla. Supermarkets, Inc. (In re Finevest Foods, Inc.)*, 143 B.R. 964, 968 (Bankr. M.D. Fla. 1992) (citing 28 U.S.C. §§ 151, 157 (2012)); *see also* Brief for Petitioner at 42, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 137 S. Ct. 1365 (2018) (No. 16-712) (citing withdrawal of the reference as a mechanism for district courts to exercise control over bankruptcy courts). This was also true under the 1898 Act. *See N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79–80 n.31 (1982).

<sup>362</sup> *See Land-O-Sun*, 143 B.R. at 968.

<sup>363</sup> *One2One*, 805 F.3d at 445 (Krause, J., concurring).

<sup>364</sup> *Id.*

<sup>365</sup> *See Brubaker, supra* note 231, at 33 n.86.

The necessity of appellate review brings the constitutionality of sections 363(m) and 364(e) into question.<sup>366</sup> Although sections 363(m) and 364(e) have the added imprimatur of Congressional enactment, they both accomplish the same ends as equitable mootness.<sup>367</sup> *Stern*, *Granfinanciera*, and *Northern Pipeline* all teach that legislative enactment is not sufficient to overcome constitutional infirmities.<sup>368</sup> No parallel enactments were present contemporaneous with the Framing. As a result, the constitutionality of these sections, like that of equitable mootness, is also doubtful.<sup>369</sup>

## VI. EXPANDED STAY PENDING APPEAL TEST

Equitable mootness' popularity compared to other prudential doctrines illustrates the importance of the policy concerns supporting the doctrine. Although the principles bounding the constitutional authority of bankruptcy courts and appellate rights arising from their judgments are tethered to the standards of 1789 and 1800, the economic realities of modern bankruptcy differ markedly from that earlier era. The perceived need for equitable mootness reflects these immense changes.

Expanding the stay pending appeal test constitutionally effectuates the policies supporting equitable mootness. The appropriate reaction to equitable mootness' unconstitutionality is not to shun the policy supporting equitable mootness; it is to repackage these concerns in a constitutional form that does not ignore the merits of the appeal. Equitable mootness is the outgrowth of the stay pending appeal test<sup>370</sup> resulting from bankruptcy's unique impact on non-party interests.<sup>371</sup> By altering the test for stay pending appeal to include consideration of non-parties' interests, it assesses equitable mootness's *raison d'être* without its unconstitutional infirmities, while still preliminarily evaluating the merits. Momentum is already building toward this conclusion.<sup>372</sup> Modifying the test will also have the ancillary benefit of evaluating these concerns in other bankruptcy contexts, such as appeals of orders under sections 363(m) and 364(e).

The test for stay pending appeal leaves room for evaluating the impact of staying the appeal on third parties. Although the Supreme Court has blessed the test for stay pending appeal, it has not rigidly defined the test's factors.<sup>373</sup> This flexibility leaves

<sup>366</sup> See *supra* Part IV (discussing 11 U.S.C. §§ 363(m) and 364(e) (2012)).

<sup>367</sup> See *Weingarten Nostat, Inc. v. Serv. Merch. Co.*, 396 F.3d 737, 742–44 (6th Cir. 2005) (“Though reflective of the general prohibition against advisory opinions undergirding the constitutional mootness doctrine, bankruptcy mootness under § 363(m) is broader. Even if the appeal is not moot as a constitutional matter because a court could provide a remedy, the policy favoring finality in bankruptcy sales reflected in § 363(m) requires that certain appeals nonetheless be treated as moot absent a stay.”).

<sup>368</sup> See *supra* Section VI.C.

<sup>369</sup> Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 134 (2012) (questioning whether § 363(m) is unconstitutional based on its elimination of the opportunity to be heard on appeal).

<sup>370</sup> As we saw in Part I, the historical lineage of equitable mootness evolved from the traditional stay pending appeal framework.

<sup>371</sup> See *supra* note 9 and accompanying text.

<sup>372</sup> See *supra* note 39 and accompanying text.

<sup>373</sup> See *Nken v. Holder*, 556 U.S. 418, 433–436 (2009).

room for individualized applications.<sup>374</sup> Courts commonly describe the test's third factor as the balance of the harms.<sup>375</sup> It evaluates "whether issuance of the stay will substantially injure the other parties interested in the proceeding" and compares this harm to the potential harm to the appellant arising from a failure to establish a stay.<sup>376</sup> Traditionally, courts have restricted the evaluation of the harm caused by the stay to the debtor, *i.e.* the debtor is a melting ice cube and a stay will destroy its chance to reorganize.<sup>377</sup> Non-parties, however, are often impacted by a bankruptcy appeal; this is the reason equitable mootness exists.<sup>378</sup> It is therefore particularly proper for a court analyzing the stay pending appeal in a bankruptcy matter to consider non-party interests as part of the third prong of the stay pending appeal test.<sup>379</sup> Their interests may even carry sufficient weight to deny a stay and allow plan or transaction to be consummated.

Unlike equitable mootness, the test for stay pending appeal also evaluates the likelihood of the appellant prevailing on the merits. An appellant must show that it has a substantial chance of success on the merits in order to obtain a stay.<sup>380</sup> Equitable mootness, in contrast, traditionally lacks any analysis of the merits. This omission can create an awkward situation where the appellate court may believe that the appellants have a reasonable chance of success on the merits but they refuse to even consider them.<sup>381</sup> In response, recent decisions have (i) briefly considered the merits

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<sup>374</sup> See *id.*

<sup>375</sup> See, e.g., *Beeman v. BGI Creditors' Liquidating Tr. (In re BGI, Inc.)*, 504 B.R. 754, 764 (S.D.N.Y. 2014).

<sup>376</sup> *Nken* 556 U.S. at 426. Courts have also generally considered the "consequences beyond the immediate parties." *In re Revel AC, Inc.*, 802 F.3d 558, 569 (3d Cir. 2015) (citing and quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 388 (7th Cir. 1984)). However, this inquiry focuses on the public in general rather than on interested parties in the bankruptcy appeal. See *In re Revel*, 802 F.3d at 573.

<sup>377</sup> See *In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 683 (Bankr. S.D.N.Y. 2016) (potential harms include "(i) lost strategic opportunities; (ii) difficulty in recruiting and retaining talent for the Debtor; (iii) incurrence of administrative and professional expenses; (iv) placing plan settlements in jeopardy; and (v) exposing the equity to be granted to non-moving creditors to market volatility and other risks.").

<sup>378</sup> See *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339 (10th Cir. 2009); *Wooley v. Faulkner (In re SI Restructuring, Inc.)*, 542 F.3d 131, 136 (5th Cir. 2008) ("The ultimate question to be decided is whether the Court can grant relief without undermining the plan and, thereby, affecting third parties.").

<sup>379</sup> See *In re Revel*, 802 F.3d at 569 (quoting *Roland*, 749 F.2d at 388); *Freeman v. Ow*, No. 16-cv-04817-JST, 2016 WL 6778667, at \*8 (N.D. Cal. Nov. 16, 2016); *United Mine Workers of Am. Combined Benefit Fund v. Walter Energy, Inc.*, No. 2:16-cv-00064-RDP, 2016 WL 470815, at \*7 (N.D. Ala. Feb. 8, 2016); *BDC Capital, Inc. v. Thoburn L.P.*, 508 B.R. 633, 640-41 (E.D. Va. 2014).

<sup>380</sup> *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011).

<sup>381</sup> See *In re Cont'l Airlines*, 91 F.3d 553, 557, 567 (3d Cir. 1996) (describing issues presented by the appeal as "interesting and challenging" but still finding equitable mootness precludes evaluation of the merits). Some courts have found this failing so troubling that they have considered the merits prior to applying equitable mootness. See *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005). However, even in the Second Circuit, courts are not required to follow this path and consider the merits prior to equitable mootness. *In re Sabine Oil & Gas Corp.*, No. 16 Civ. 6054 (LAP), 2017 WL 477780, at \*4 (S.D.N.Y. Feb. 3, 2017).

as part of the equitable mootness inquiry<sup>382</sup> or (ii) made an equitable mootness determination contemporaneously with a determination on the merits.<sup>383</sup> These are half-measures that only highlight this shortcoming.

As an ancillary benefit, the expanded stay pending appeal test would also improve the application of statutory mootness provisions of the Code by evaluating bankruptcy-specific concerns. Bankruptcy appeals, especially those involving a sale or financing by the debtor, often affect third parties who are not actively involved in an appeal.<sup>384</sup> Recognizing this, some courts evaluating whether to grant a stay pending appeal of an order where either section 363(m) or 364(e) may moot an appeal, consider the impact of the stay on non-parties.<sup>385</sup> Many courts, however, often only consider the interests of the parties to the appeal.<sup>386</sup> The expanded stay pending appeal test would ensure that third parties' interests are evaluated.

The expanded stay pending appeal test brings the evolution of equitable mootness full circle. It reflects the concerns that originally birthed the equitable mootness doctrine but returns the doctrine to constitutionality. Equitable mootness is rooted in the unfairness of reversal for the third-parties and importance of facilitating reorganizations. By evaluating this issue in the context of a stay pending appeal, it will make stays more difficult to obtain and the reorganization of the debtor will be more likely to continue uninterrupted.<sup>387</sup> Meanwhile, the appellant's constitutionally protected right to appellate review on the merits is not eliminated by judicial discretion.

#### CONCLUSION

In an ideal world, Congress would enact a statutory provision establishing equitable mootness and outline the types of proceedings where it would apply. Unfortunately, Congressional action does not appear likely. It is especially unlikely when Congress can rely upon the prudential version as a substitute for its own action.

The continued application of equitable mootness in spite of its many failings—statutory, equitable, prudential, and constitutional—simply because it is efficient and useful is improper. A prudential doctrine without a statutory basis where a judge can eliminate an appeal without even considering the merits simply does not comport with Supreme Court precedent or the historical nature of bankruptcy court authority and appellate review. It is time to discard equitable mootness in its current

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<sup>382</sup> *Paige*, at 1339 (advocating for a “quick look at the merits”); *Deutsche Bank*, 416 F.3d at 144 (“[A]n appraisal of the merits is essential to the framing of an equitable remedy.”); see also *In re One2One Commc'ns, LLC*, 805 F.3d 428, 454 (3d Cir. 2015) (Krause, J., concurring) (arguing against the vitality of equitable mootness but suggesting that the Third Circuit adopt this element if equitable mootness is retained).

<sup>383</sup> See *In re Peabody Energy Corp.*, 582 B.R. 771, 779–81, 784 (E.D. Mo. 2017).

<sup>384</sup> The unraveling of a sale or financing could easily sabotage a debtor's chances for reorganizing, thereby injuring all its creditors as well as third-parties who relied upon the sale or financing when transacting with the debtor.

<sup>385</sup> See *In re Minor*, Case No. 13–18227, 2016 WL 3462068, at \*3 (Bankr. N.D. Ohio June 17, 2016).

<sup>386</sup> See *supra* note 377 and accompanying text.

<sup>387</sup> An unstayed appeal also makes constitutional mootness and more limited relief more likely.

form.<sup>388</sup> Nothing else will spur Congress. Only by coming full circle and abandoning equitable mootness as a prudential doctrine will Congress enact a constitutional substitute. In the interim, expanding the stay pending appeal test to weigh the impact on non-parties of staying a bankruptcy appeal will constitutionally manifest the concerns at the core of equitable mootness.

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<sup>388</sup> It will take a Supreme Court decision to provide clarity, let alone to eliminate the doctrine. See Paul A. Avron, *Equitable Mootness: Is it Time for the Supreme Court to Weigh in?*, Am. Bankr. Inst. J., Mar. 2017, at 36.